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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-379

DAN SULLIVAN, an infant, by his next friend,
DANIEL SULLIVAN, *et al.*,

Petitioners,

—against—

HOUSTON INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1973

No.

DAN SULLIVAN, an infant, by his next friend,
DANIEL SULLIVAN, *et al.*,

Petitioners,

-v-

HOUSTON INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 15, 1973.

Opinions Below

The memorandum opinion dated November 17, 1969 in support of the district court's original permanent injunction decree and declaratory judgment is reported at 307 F.Supp. 1328 and is set out in the Appendix, *infra*, 1a to 39a. The district court's memorandum opinion and order dated June 23, 1971, which contains in full the original permanent injunction decree and declaratory judgment, is reported at 333 F.Supp. 1149 and is set out in the Appendix, *infra*, 40a to 104a. The district court's Supplementary Permanent Injunctive Decree of October 7, 1971 is not reported and is set forth in the

Appendix, *infra*, 105a to 109a. The opinion of the Court of Appeals is reported at 475 F.2d 1071 and is set out in the Appendix, *infra*, 110a to 126a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 15, 1973. A petition for rehearing and suggestion of en banc rehearing was denied on April 30, 1973. On July 23, 1973, Mr. Justice Powell issued an order extending the time within which to file this petition for writ of certiorari up to and including August 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the application of a "clean hands" doctrine as a bar to an action challenging unconstitutional school rules abridges the First Amendment rights of students.

2. Whether a school district violates the First Amendment rights of students when it requires the submission of all written material to school officials prior to its distribution on or near school premises.

3. Whether school officials violate the First Amendment rights of students when:

a. they prohibit all sales of publications by students on or near school premises.

b. they prohibit distribution of a publication because it contains language advocating illegal activities or disobedience to school regulations, without regard to any showing of "material and substantial disruption" of school activities.

c. they prohibit distribution on campus of any literature advocating the nomination or election of any person to public office.

d. they suppress a student publication because it contains "obscene language" when the publication is not obscene for minors.

e. they require that contributors, editors and publishers of student publications be identified on the publication.

Statement of the Case

This is a civil rights action, brought pursuant to 42 U.S.C. § 1983, involving a broad range of First Amendment issues related to the distribution of student publications on or near school property. There were two stages to the proceedings in the district court, with an appeal taken only from the second.

The action was commenced in March 1969 by two Houston high school students, Dan Sullivan and Mike Fischer, who had been summarily expelled for distributing *Pflashlyte*, a newspaper that they published and that criticized school policies. The action was brought as a class action on behalf of all students in the last three high school grades of the Houston School District. In November 1969, the district court, in a lengthy opinion broadly reaffirming the students' First Amendment rights, held that the suit was properly a class action, ordered that Sullivan and Fischer be reinstated, enjoined enforcement of the regulation under which they were suspended, and set out guidelines for the permissible regulation of distribution of literature. App., *infra*, 1a-39a.

An appeal from that judgment was dismissed on the school district's own motion.

In February 1970 the school district issued new rules regarding distribution of literature on school premises and off school premises if "distribution is calculated to and in fact does result in possession by students on school premises." App., *infra*, 95a, n. 3. The rules included: 1) a requirement that all written material be submitted to the principal for approval before distribution; 2) a requirement that each publication bear the names of its publishers, editors and publishers; 3) a prohibition against publications which contain "libelous or obscene language"; 4) a prohibition against publications which advocate "illegal action or disobedience to published rules on student conduct"; 5) a prohibition against all sales of publica-

tions, and 6) a prohibition against all literature "advocating the nomination or election of any person for public office."

On October 20, 1970, Paul Kitchen was standing near an entrance to, but not on, the school premises, selling a newspaper called SPACE CITY! to students on their way to school, when he was confronted by the school principal, Gorden Cotton, and told to stop selling the paper because he was violating school board policy.

Kitchen continued selling the newspaper, and was shortly thereafter summoned to the principal's office and summarily suspended "for his failure to comply with both the prior submission rule and Mr. Cotton's request that he stop selling the papers." App., *infra,* 115a. The suspension was to last until October 26, the time of a scheduled conference between the principal and Kitchen's parents. In anger, Kitchen shouted, "goddamn" and slammed the door to the principal's office. App., *infra,* 48a.

On the morning of October 26, Kitchen again attempted to sell SPACE CITY! near the school and was again confronted by the principal, who threatened to have Kitchen arrested if he continued to sell the papers. In the course of this confrontation Kitchen "employed the common Anglo-Saxon vulgarism for sexual intercourse." App., *infra,* 116a.

Paul was arrested, taken to the police station, and later released. A suspension letter was sent out that day informing the parents that Paul was suspended for the remainder of the semester for violating the school policy "regarding school publications" and "using profanity in the presence" of two women assistants (an apparent reference to the October 20 incident). App., *infra,* 96a, n. 5.

After a hearing on October 29 before the principal, who upheld his suspension of Kitchen, and an appeal and hearing before the assistant superintendent for the School District, who also upheld the suspension, Kitchen filed a proceeding for contempt and supplementary injunctive relief in the district court. The district court ordered Kitchen reinstated and, on

October 7, 1971, entered a supplementary injunctive decree enjoining enforcement of the school board's February 1970 regulations concerning prior submission, sale of publications, censorship of obscene language, advocacy of illegal activities or disobedience to school rules, and any other regulation proscribing "the distribution of written material on the basis of its content" that is not obscene and does not result in "substantial and material interference with 'normal classroom activity' or 'normal school function'...." App., *infra*, 105a-109a. The request for a contempt citation was denied. App., *infra*, 92a.

Both parties appealed from this order. The Fifth Circuit left the original injunction in force, but vacated the supplementary injunctive decree on the grounds that, by failing to obey the school district rules and the school principal's order and in using profanity, Paul Kitchen did not come into court with clean hands, and could not seek injunctive relief. App., *infra*, 119a, 122a.

By vacating the supplementary decree, which had invalidated the school district's February 1970 regulations, the Court of Appeals left school officials free to enforce those regulations against the class of students in whose behalf the action had been prosecuted.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Holding That Persons Seeking Vindication of Their First Amendment Rights Must Come Into Court With Clean Hands Is Without Precedent in This Court and Defies Well Settled Constitutional Principles.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court developed a constitutional test under which students' First Amendment rights enjoyed full constitutional protection so long as their exercise did not "materially and substantially disrupt" school activities. 393 U.S. at 513.

Although there is no evidence in the record that Paul Kitchen disrupted, materially or otherwise, any school activities

in distributing his underground newspaper, the Fifth Circuit refused to consider his constitutional claim because he failed to "come into court with clean hands." App., *infra*, 122a. This unique condition to enjoyment of First Amendment rights is without foundation in *Tinker* – or, for that matter, in any other decision of this Court.

The court below, in holding that courts may legitimately refuse "to accord constitutional protection to the actions of students who blatantly and deliberately flout school regulations and defy school authorities," App., *infra*, 120a, seemed to be articulating the following "clean hands" principle: Students that disobey school rules may not later come into court and challenge the constitutionality of those rules or any other rules.

Although it apparently makes no difference to the court whether or not the rule or order that is disobeyed is constitutional, it is helpful to discuss separately (1) disobedience which is of an unconstitutional rule or order and (2) disobedience which may be of a constitutional rule or order.

(1) The court below rejected Kitchen's constitutional arguments because of his "flagrant disregard of established school regulations [and] his open and repeated defiance of the principal's request." App., *infra*, 120a. As the district court held, the regulations that Kitchen allegedly violated in distributing his newspaper were not only unconstitutional,[1] but also illegal in that they violated the district court's injunction. App., *infra*, 50a. The principal's request, based on those regulations, was similarly unconstitutional and illegal. Kitchen should have been free to disregard both.

It is as much a perversion of equitable principles as it is of constitutional principles to suggest that it is the person who peacefully exercises First Amendment rights, rather than the school official who seeks to abridge those rights, who lacks "clean hands".

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1. See discussion in sections 2 and 3, *infra*.

This Court has consistently held that a citizen "cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963). Whether that command be given by an officer from the school or the police force, one does not, as Chief Justice Stone observed, forfeit his right "to attack its constitutionality, because he has not yielded to its demands." *Jones v. Opelika*, 316 U.S. 584, 602 (1942) (dissenting opinion), quoted in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). See also, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Staub v. Baxley*, 355 U.S. 313 (1958); *Lovell v. Griffin*, 303 U.S. 444 (1938).

In *Tinker*, this Court passed upon a school district's policy prohibiting students from wearing black armbands in protest against the war in Vietnam. Without devoting a single word of discussion to the fact that the plaintiffs, in wearing their armbands and suffering suspension, had "blatantly and deliberately" flouted the school district policy, the Court proceeded to an analysis of the policy and concluded that it abridged the students' First Amendment rights.

Not only *Tinker*, but each of the federal court decisions upon which it relied, accept the proposition that the constitutionality of school rules may be challenged in defense to suspensions and expulsions imposed for violating them. See *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Hammond v. South Carolina State College*, 272 F.Supp. 947 (D.S.C. 1967); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D. Ala. 1967). Subsequent federal cases have upheld the constitutional claims of students who disobeyed school rules. *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Stull v. School Board of Western Beaver Jr.-Sr. High School*, 459 F.2d 339 (3rd Cir. 1972); *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971) (all cases involving school regulation of hair length); *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972) (prior submission rule).

Even where courts have rejected those claims, they have not suggested that the student's disobedience barred consideration of the constitutional issue. *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); *King v. Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971) (all long hair cases); *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970) (wearing political buttons prohibited); *Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971) (prohibition of demonstrations within school buildings upheld).[2]

The same approach is evident in cases concerning the First Amendment rights of teachers. See, e.g., *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972) (teacher's right to wear armband upheld); *Russo v. Central School District No. 1*, 469 F.2d 623 (2d Cir. 1972) (teacher's right to stand silently during pledge of allegiance); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Parducci v. Rutland*, 316 F.Supp. 352 (M.D. Ala. 1970) (both invalidating teacher's dismissal for assigning material containing "offensive" words).

The court below cites only two decisions in which federal courts have held that students were barred from challenging the constitutionality of school rules or policies because of their failure to comply with them.[3] The first of these, *Schwartz v.*

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2. Interestingly, the Fifth Circuit has itself reached the constitutional issues in several cases where students violated the rule at issue. *Stevenson v. Board of Education*, 426 F.2d 1154 (1970); *Ferrell v. Dallas Indep. School Dist.*, 392 F.2d 697 (1968); *Griffin v. Tatum*, 425 F.2d 201 (1970); *Burnside v. Byars, supra; Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (1966).

3. The other cases cited by the Fifth Circuit are not pertinent. Neither *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1973) nor *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969) upheld suspensions simply because students had violated school rules; rather, both courts found that the students had engaged in conduct that was not protected by the First Amendment. Although there is dictum in *Quarterman v. Byrd*, 453 F.2d 54, 60 n. 11 (4th Cir. 1971) suggesting sympathy for some "clean hands" rule in school cases, the plaintiff's suspension, imposed for violating the school's distribution rule, was

Schuker, 298 F.Supp. 238 (E.D.N.Y. 1969), cited no other case that reached the same result.[4] The second, *Graham v. Houston Independent School District*, 335 F.Supp. 1164 (S.D. Tex. 1970), cited only *Schwartz*.

In short, with the exception of *Schwartz* and *Graham*, there is no authority at all for the conclusion reached below that a student who violates a school rule is barred from subsequently challenging its constitutional validity.

(2) The Fifth Circuit's second reason for declining to consider Paul Kitchen's challenge to the school district's rules was "his resort to profane epithet. . ." App., *infra*, 120a. It is important to note, however, that the Fifth Circuit was not merely saying that the use of profanity on school premises does not enjoy constitutional protection. Such a holding, although raising troublesome First Amendment questions, would at least have an arguable legal foundation.[5] But the Fifth Circuit held, in addition, that students who use profanity are barred from challenging school rules that unconstitutionally abridge their right to distribute literature. Although the court called this an application of the "clean hands" doctrine, it cited no other case that had ever reached the same result.

The limits of the rule seemingly articulated by the Fifth Circuit—that certain persons, by reason of prior bad conduct, forfeit their constitutional rights—are not spelled out. Does the rule apply to all persons, or only to students, and to all

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expunged and the rule declared unconstitutional. *Healy v. James*, 408 U.S. 169 (1972) states that official recognition of a college organization may be denied if the organization will not agree to abide by "reasonable campus regulations." There is nothing in the opinion to suggest that unconstitutional regulations would be considered reasonable and that obedience to them would be compelled.

4. The court did cite *Jones v. State Board of Education*, 407 F.2d 834 (6th Cir. 1969) but this issue was not even considered by the Sixth Circuit.

5. Compare *Gooding v. Wilson*, 405 U.S. 518 (1972) with *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

constitutional rights[6] or only to First Amendment rights? What kind of misconduct results in a forfeiture and how long does it last?

Broadly applied, the rule defies the settled constitutional principle that attacks on overly broad statutes will be permitted "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965), quoted in *Gooding v. Wilson,* 405 U.S. 518, 521 (1972). As a rule narrowly applied only to alleged student misconduct, it ignores the factual setting in which *Healy v. James,* 408 U.S. 169 (1972) was litigated as well as last Term's decision in *Papish v. University of Missouri Board of Curators,* 41 U.S. Law Week 3496 (March 19, 1973). What the Court said there may be said as appropriately about Paul Kitchen here: "[D]isenchantment with Miss Papish's performance, understandable as it may have been, is not justification for denial of constitutional rights." *Id.* at 3496 n. 3.

The decision below presents an even more compelling case for reversal than *Papish* because it has been denominated a class action. By vacating the district court injunction, the Fifth Circuit has penalized the entire class for the alleged misconduct of one student. As a result, students in the Houston Independent School District remain subject to rules which will "tend to suppress constitutionally protected rights." *Coates v. Cincinnati,* 402 U.S. 611, 620 (1971) (opinion of White, J.).

The impediment to vindication of First Amendment rights imposed by the Court below is unprecedented. Certiorari should be granted to reaffirm this Court's promise to public school students that "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker, supra,* 393 U.S. at 513.

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6. As Justice Frankfurter said, the Fourth Amendment protects even "dubious characters." *Harris v. United States,* 331 U.S. 145, 156 (1947) (dissenting opinion).

2. The Requirement That Students Submit All Written Material To The Principal In Advance Of Distribution Is An Unconstitutional Prior Restraint On Free Speech And Expression.

This Court has consistently looked upon systems of prior restraint with suspicion. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Although it has suggested that the prohibition against prior restraints is not absolute, the Court has never approved a prior restraint upon written material. *Cf. Freedman v. Maryland*, 380 U.S. 51 (1965). If one were to be approved, this Court has made it clear that it would only be under the narrowest of circumstances. *New York Times Co. v. United States, supra.*

No decision nor dictum of this Court has ever suggested that government could require of an *entire* group of persons that they submit for executive approval *all* writings before distribution would be permitted. No prior restraint will be tolerated which is "predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 725-26 (Brennan, J., concurring). Rather, there must be "governmental allegation and proof that publication must inevitably, directly and immediately", *id.* at 726-27, cause an event of the most profound seriousness. Curiously, the school district here has not only failed to offer direct evidence of serious consequences, but has not even offered "surmise or conjecture" about such consequences.

In the absence of some evidence of specific, serious consequences justifying the prior submission rule, it quite clearly is inconsistent with fundamental First Amendment doctrine and with this Court's reaffirmation of students' First Amendment rights in *Tinker.* As this Court said, "[u]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of speech." 393 U.S. at 508.

Two circuits have invalidated rules requiring prior approval of student literature on the basis of *Tinker. Fujishima v. Board*

of Education, 460 F.2d 1355 (7th Cir. 1972); *Riseman v. School Committee*, 439 F.2d 148 (1st Cir. 1971).[7] Two circuits have reached the same result as the Court below. *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

This Court should grant *certiorari* on this issue in order to overrule the Fifth Circuit's departure from settled constitutional principles and to reconcile the conflict in the circuits.

3. The School District's Rules Regarding Sale And Content Of Literature Violate This Court's Holding in Tinker And The Decisions Of Other Circuits.

The school district's rules regarding sale and content of literature ignore the *Tinker* holding that First Amendment rights of students may not be abridged except upon evidence "which might reasonably" lead school officials "to forecast substantial disruption of or material interference with school activities. . . ." 393 U.S. at 514. However, the prohibitions regarding content and sales are blanket bans which the district has not attempted to support by any specific evidence justifying fear of disruption.

a) *Sales.* The school district regulations include a ban on all sales of publications on or near school property. App., *infra*, 95a, n. 3. There is no evidence offered by the school district that sales of literature are any more likely to cause disruption than free distribution. In fact, on the day Paul Kitchen was suspended, he was selling SPACE CITY! without incident until his confrontation with the principal.

This Court has held that the right to sell literature is an essential ingredient of First Amendment guarantees. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The effect of school district rules prohibiting sale of literature will substantially curtail the First Amendment rights of students who cannot bear the full costs of publishing a newspaper. As *Murdock* said, "Freedom of

7. Neither the New York City or Philadelphia school systems have found it necessary to require prior approval of student literature. *Sullivan v. Houston Independent School District*, 333 F.Supp. 1149, 1161 n.14 (S.D. Tex. 1971).

speech, freedom of the press, and freedom of religion are available to all, not merely to those who can pay their own way." *Id.* at 111.

Interestingly, the Fifth Circuit's decision in *New Left Education Project v. University of Texas*, 472 F.2d 218 (5th Cir. 1973) indicates that, if it reached the merits of the prohibition on sales, it would hold the ban unconstitutional. Although no other circuit court has directly passed on this issue, the Seventh Circuit implicitly approved sale of literature in *Scoville v. Board of Education*, 425 F.2d 10 (7th Cir. 1970). One district court has explicitly reached that result. *Jacobs v. Board of Education*, 349 F.Supp. 605 (S.D. Ind. 1972).

b. *Advocacy of illegal activities.* The school district rules prohibit the distribution of any publication that "advocates illegal action or disobedience to published rules on student conduct. . . ." App., *infra*, 95a, n. 3. No evidence has been adduced by the school district that such a rule is necessary to prevent material disruption. Inasmuch as the rule prohibits all such advocacy, whether "as an abstract doctrine" or as a call to "concrete action", the rule violates this Court's holding in *Yates v. United States*, 354 U.S. 298, 320, 321 (1957).

A similar rule has been invalidated by the Seventh Circuit. *Scoville v. Board of Education*, 425 F.2d 10 (7th Cir. 1970). See also, *Baughman v. Freienmuth*, No. 72-1892, ___ F.2d ___ (4th Cir., May 17, 1973).

c. *Advocacy regarding candidates for public office.* The district's rule prohibiting distribution of any material "advocating the nomination or election of any person for public office," App., *infra*, 95a, n. 3, is an unconstitutional infringement of students' right to participate in the political process. As the Fifth Circuit itself has observed, this right is especially important now that the voting age has been lowered to 18. *Shanley v. Northeast Independent School District*, 462 F.2d 960, 978 (5th Cir. 1972). In the absence of specific evidence that literature related to political campaigns is substantially disruptive, the rule is inconsistent with *Tinker*.

Two federal courts have invalidated similar prohibitions. *Rowe v. Campbell Union High School District*, Civil Action No.

51060 (N.D. Cal. Sept. 4, 1970) (3-judge court); *Sanders v. Martin*, 72 C 1398 (E.D.N.Y. Nov. 21, 1972).

d. *Obscenity.* The school district's prohibition against "obscene language," App., *infra*, 95a, n. 3, is unconstitutionally overbroad. *Ginsberg v. New York*, 390 U.S. 629 (1968). It is evident from the principal's action on the day of Kitchen's distribution that school officials intend to enforce the rule against constitutionally protected literature that contains words of which they do not approve. This Court's observation that the censorship of such words inevitably results in censorship of ideas, *Cohen v. California*, 403 U.S. 15 (1971), is well illustrated by the principal's action here. His treatment of Kitchen led the district court to "reluctantly" conclude "that Mr. Cotton determined to prevent distribution of a particular issue of SPACE CITY! because he disapproved of its social philosophy, its political position, and its unorthodox style." (App., *infra*, 74a.)

Federal courts have uniformly overruled school officials seeking to prohibit or punish the use of disapproved words. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Fujishima v. Board of Education*, *supra*; *Koppell v. Levine*, 347 F.Supp. 456 (E.D.N.Y. 1972); *Vought v. Van Buren Public School*, 306 F.Supp. 1388 (E.D. Mich. 1969).

e. *Anonymity.* The school district requires that any distributed publication "contain the names of the individual contributors, editors, and publishers." App., *infra*, 95a, n. 3. This Court, in upholding the right to distribute written material anonymously in *Talley v. California*, 362 U.S. 60 (1960), has recognized that the fear of reprisal created by an identification requirement can substantially inhibit free expression.[8] The school district has made no attempt to justify this significant limitation of the First Amendment rights of students on the basis of disruption of school activities.

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8. Although no federal court has passed on this issue, the three-judge court in *Rowe v. Campbell Union High School District*, *supra*, citing *Talley v. California*, observed: "Defendants admit that the . . . paragraph requiring identification of the publishers is unconstitutional."

Given the extraordinary hostility shown by school officials around the country to student criticism of school policies and other student expression on controversial subjects, and given the enormous power such officials have to affect the future lives of students, it can be fairly assumed that many students will refrain from exercising their First Amendment rights if they are required to identify themselves as authors of officially disfavored publications. The extra-curricular "personal intercommunication among students" which this Court hoped to foster in *Tinker, supra,* 393 U.S. at 512, will surely be inhibited.

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

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August 29, 1973

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* Attorneys for petitioners gratefully acknowledge the assistance of Susan C. Nicholas, a second-year student at the New York University School of Law, in the preparation of this petition.

Memorandum Opinion — November 17, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Civil Action No. 69-H-266

DAN SULLIVAN, by next friend,
DANIEL H. SULLIVAN, et al.,
plaintiffs,

—against—

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,
defendants.

This action was instituted on behalf of two Houston high school students who were expelled from Sharpstown Junior/Senior High School for the remainder of the 1968-1969 term because of their involvement in the production and distribution of a "newspaper" called the Pfashlyte (see appendix A.) which criticized school officials. The complaint was filed pursuant to 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343(3) and it prayed for an injunctive order reinstating the two students and also for declaratory and injunctive relief in an attack against the regulations of the Houston Independent School District pursuant to the Declaratory Judgment Act, 28 U.S. C.A. §2201, and Rule 23 of the Federal Rules of Civil Procedure governing class actions.

I.

Sharpstown Junior/Senior High School is one of Houston's newest schools having opened only a year ago. Sharpstown is a large school with age levels varying from the seventh to the twelfth grade. This first year for Sharpstown was also the first experience

for Mr. Coy P. Stewart as principal of a senior high school; he had just completed three years as principal of McReynolds Junior High when Sharpstown opened.

Dan Sullivan and Mike Fischer were seniors at Sharpstown during this first year — the 1968-1969 school term. Dan had attended Bellaire High School the previous year and Mike had gone to Lee High School. Both were "B" students. Their conduct records reflect a few minor infractions but neither student appears to have been a discipline problem. In fact, their conduct grade was "good." Their school record and their actions before this court point to the conclusion that Dan and Mike are rather typical young American men of high moral character.

After their first several months at Sharpstown, Dan and Mike along with some other students became concerned with the absence of any express school regulations governing student conduct. The complaint was, in essence, that a student never knew when he was violating "regulations" since no rules had ever been written down and distributed. Dan, for instance, was told that wearing a neckerchief around his neck violated "school regulations." Confusion also existed concerning the use of a park across from the school before classes began in the morning. Sometimes it was prohibited and sometimes it was not.

Concern for this problem led to the organization of a "rally" after school one day in a nearby park. Students and teachers were present and they all sat on the grass and listened to speeches by students who used the chance to air some grievances. The discus-

sion was interrupted by the physical interference of certain Sharpstown High athletic coaches who threw books around the park, ripped up students' notebooks and accused students of being Communists and Fascists.

There were other incidents of harassment by gym coaches which added to the list of student complaints. On one occasion, Dan Sullivan was called into a coach's office and subjected to strong verbal abuse. When Dan stepped aside as someone entered the office door so that he had to lean against one of the coach's desks, the coach ordered him to get off that desk or he would get his "block knocked off."

In addition, it appears that some of the students in Mike Fischer's gym class who attended the rally were given "grade cuts." Mike's gym instructor later informed him that because of the present lawsuit Mike would receive an "F" in the course if the instructor could "get away with it."

After the incident at the "rally," some of the students decided to wear small American flags in their shirt lapels as a show of patriotism. Dan Sullivan had called the Houston office of the Federal Bureau of Investigation to ask if this was an acceptable way to display the flag and upon being assured that it was proper, he wore a flag to school. Dan was informed by a coach to remove the flag on penalty of suspension from school. The flag, the coach said, "was disruptive."

Another incident concerned solicitations for various fund-raising projects during school hours. Dan, Mike and a friend named Larry Craven approached Mr. Stewart about sponsoring a Red Cross drive for the

straving people of Biafra. Dan had called the American Red Cross and they had expressed enthusiasm for the project. Mr. Stewart told the boys that such a program could not be allowed because it was explicitedly prohibited by the downtown office to have any kind of solicitation from students during school time. The boys suggested small unobstrusive cans with coin slots to be placed on lunch tables. Stewart said this too was against "regulations." Dan later called the downtown office and was told that it was up to the principal to decide which fund drives should be allowed within the school.

Several weeks later, Mr. Stewart announced that as part of the senior project the school was to have a fund drive to collect $500.00 for the purchase of tropical plants, to be placed in a large planter box. Each student was expected to contribute twenty-five cents. Dan was asked by his physics teacher to make his contribution, not only during class time, but while an exam was in progress. When he refused to contribute saying it seemed somewhat hypocritical, Dan was lectured by the teacher and was told that his mind was being taken over by Communists.

Some time after these incidents, Mike and Dan decided they would put together a "newspaper" to voice their dissatisfactions and beliefs. Both were acquainted with one Walter Spinks who attended Lee High School the year before and was then a freshman at the University of Houston. Spinks said it would be possible to have the printing done at the University's print shop. Only campus-approved organizations had access to the print shop but Spinks knew some people who were members of the Students for a Democratic Society (SDS), which was Univer-

sity approved organization, who would let them use the SDS name on a University work order so that the campus print shop would do the printing.

Dan drafted the first "newspaper" which was more of a short introductory issue for the forthcoming first edition of the *Pflashlyte*; it set out the aims and goals of the editors. The boys took the stencil and money for the printing to the University of Houston and while there Mike and Dan attended a meeting of the SDS not only out of curosity but also to be sure the printing would be done. The meeting was held in the World Affairs room of the student center and Mike and Dan soon found that SDS was very much against their beliefs. They attended three other meetings but only to insure that their "newspaper" would be printed.

When the copies of the introductory issue were received from the printer, the boys found that the letters SDS had been printed at the bottom of each page. Since they wanted no connection with this organization, they cut off the bottom portion of each of the 125 sheets so as to remove the SDS initials.

The stencil for the second "newspaper", the first one bearing the name *Pfashlyte*, was delivered to the printer soon after the first one. The boys were able to pick up these copies the day after they received the copies of the first issue and so only a few copies of the "introductory" edition were ever distributed. When the second edition was finished Mike and Dan found that it had been printed on both sides of legal size paper instead of on two sheets. They had ordered 2,000 sheets thinking they would get 1,000 copies but now they had 2,000 copies. Also, the name

"Students for a Democratic Society" was printed on the back side in a position high enough on the page so that it could not be cut off without removing a portion of the printing on the front side. On the third edition, the letters SDS were in the middle of the reverse side.

The second edition was written rather hurriedly and since the boys wanted to try to produce something with a higher standard of quality, they spent more time on the third edition. Several books on constitutional law and American government were obtained from a local public library and Mike and Dan included research from these books in their "newspaper." One such book was Mr. Justice Douglas' *The Living Bill of Rights.* Others included a classroom textbook entitled *American Government* by Cloudner; the *Bill of Rights Reader* by Konvitz; and a third called *Leading Constitutional Cases.* Their research efforts were in the evenings and were not part of any school courses.

Mike and Dan began distribution of the introductory paper on February 27, 1969 and then continued on the 28th. The second edition was ready by the 28th so the students' efforts were directed at distributing it on that day which was a Friday and then again during the early part of the following week. Several other students helped Mike and Dan distribute the "newspaper" and they were instructed to not hand out the paper on school grounds or during school hours. They were also asked by Mike and Dan to tell students not to take the paper into the school with them but if they had to do so, to keep it in a notebook so that it would be out of sight. Distribution

began in Landsdale Park just across the street from Sharpstown High. As students passed by on their way to classes they were given copies. Issues were later handed out at Sharpstown Shopping Center and at various shops where students were known to congregate. About 1,000 copies of the second edition were eventually distributed. Most students did as Mike and Dan requested but others did not. In one boys' restroom, a stack of papers was found with a sign above it saying "take one." Copies were also placed in a paper towel dispenser and some were found inside sewing machines in a girls homemaking class.

It also appears that some copies were found in classrooms during school hours. Teacher Don Ellisor found a student reading the *Pflashlyte* during class when she should have been working on an assignment. He took up the paper without disrupting the class. An English instructor, Mrs. Jeannine Wallace, had to take up papers from two students who were reading it during class. One student had laughed out-loud as she read and the teacher felt the need to take the paper from her. Mrs. Wallace had in the past taken up copies of the school-sponsored newspaper, *The Torch*, which students read in class. Mrs. Wallace also noticed somewhat more congestion in the halls as students made their way from one class to another.

Mrs. Woodie Kendall, a seventh grade teacher at Sharpstown, took up a copy of the "newspaper" from five boys who were reading it before class began for their homeroom period. She also noticed more congestion in the halls and added that movement through the school had been a problem since the school had opened because the halls were rather narrow. Mrs. Cyril Hosley, a typing instructor, observed an unusually large number of students tardy in arriving for class on February 28, 1969 and the following week, but she did not know a specific reason for the tardiness. Mrs. Hosley did see copies of the *Pflashlyte* in her room but did not take them up as they had not created any disturbance.

Math instructor Sidney Johnson was interrupted during a lecture by a student who twisted around in his seat to get a look at a copy of the paper held by the student behind him. Johnson immediately confiscated the copy and sent both boys to the principal's office. Another of Johnson's classes were interrupted when a student tried to ask a question about the newspaper.

Charles Smith, also a math teacher at Sharpstown, was interrupted during his class lectures. Students wanted to talk about the *Pflashlyte* as often as twice a day for two or three days and then only once a day thereafter.

Assistant Principal Jackson attempted to summarize the disruptive effect on the school which resulted from the distribution of the Pflashlyte:

Q. During that one-week period was there any disruption of the ordinary routine of the school or operations of the school which you

believe is attributable to the fact that this paper was being circulated in the school? . . .

THE WITNESS: Sir, it will be virtually impossible for me to pinpoint a single incident. It would be my interpretation of the general attitude of the student body, which I couldn't say that at such-and-such a time that happened. I work with it every day.

THE COURT: You have a feeling for it?

THE WITNESS: Yes, sir, I do.

THE COURT: You have a feeling that the students' attitude was a certain way?

THE WITNESS: There seemed to be a difference in the attitude is the way I would say it, a marked difference.

Q. (By Mr. Cook) In what way was it different from the ordinary attitude?
A. Well—

Q. Was it better or worse:
A. Indifferent. I couldn't describe it as being better. There seemed to be, the attitude seemed to be, I don't know if its going to say what I, more concerned with something else. I wanted to say that you often see a group in the hall standing together and talking in between classes, passing time. You might see a group, a large group gathering at a lunch table. This in itself may or may not be attributed to something like this. It's difficult to say. There seemed to be, if I might describe it this way, there seemed to be somthing of concern that was generally among the student body.
Q. Would you say that there prevailed an attitude of preoccupation of something that

doesn't ordinarily go on in the school building? . . .

THE COURT: Do you know a synonym for preoccupied?

THE WITNESS: I would say that they had been, let me think a minute. They had something on their minds that was causing them to be of great concern. That's my own choice of words.

Tr. at 550-53.

Sharpstown's principal, Mr. Coy P. Stewart, first learned of the presence of the *Pflashlyte* in the school building on Friday, February 28, 1969, the first day of large scale distribution. He received a copy of the short "introductory" issue in the mail and soon after classes began a teacher brought in a copy of the second edition which had been taken from a student. As more and more copies came to the administrative office, not only from teachers but from students, he became quite anxious about the situation and resolved that the students responsible would be expelled immediately. Stewart launched an investigation into the matter and he and other administrative personnel questioned students throughout the school trying to learn the identity of *Pflashlyte's* editors and distributors. He soon learned that two boys had been handing out the "newspaper" in Landsdale Park before school started in the morning. Stewart obtained descriptions of the boys as his investigation continued into the following week. By the middle of the week Stewart began to suspect Dan Sullivan and Mike Fisher. On Wednesday, March 5, 1969, Dan was called in by Mr. Stewart who began asking him random questions about his family, his

teachers and about a theme paper Dan had written for an English class. It later developed that other Sharpstown students at the direction of administrative personnel had quietly filed past the open door of Stewart's office so that Dan could be viewed and identified as one of those who had distributed the *Pflashlyte*. Mr. Stewart made no mention of the "newspaper" to Dan.

On that Friday, March 7, 1969, Dan and Mike were called in separately to talk with Mr. Stewart and Assistant Principal Jackson. Both boys admitted that they had distributed the paper. Stewart advised them that their actions were serious violations of "school regulations" especially because of their involvement in a "secret organization." However, neither boy was informed of what disciplinary action, if any, would be taken nor were they offered the opportunity to cease their actions so as to mitigate their punishment.

The next contact Mike had with the administration was Wednesday, March 12, 1969. He came to the principal's office and found that his father was already conferring with Mr. Stewart. Mike was told he was being expelled for the remainder of his senior year. Dan was told the following day that he, too, was expelled. Stewart phoned Dan's mother who came to the school for a conference. She asked if Dan could stay in school if the paper were discontinued but Stewart said this was too serious. Mike Fischer spoke to Mr. Stewart again on Thursday, the 13th, and offered to cease all activities concerning the "newspaper" but Stewart refused saying Mike's "attitude" was bad.

It was clearly established that both boys were expelled solely for their involvement with the *Pflashlyte* and not for any previous misconduct as the defendants have argued.

Mr. Stewart did indicate to both boys he would try to help them obtain admittance to another Houston high school. Mrs. Fischer went to see the principal at Lee High School the day after Mike was suspended but was told by the Assistant Principal that the principal was out of town and that he had left instructions to admit no new students except those who had just moved into the district. She also called Bellaire High School but was unable to contact the principal. St. Thomas High School refused acceptance of a transfer because it was too late in the school year and Marion High School gave Mrs. Fischer the same answer. Mrs. Fischer also telephoned Mr. Myrl Johnson, Assistant Superintendent for Secondary Schools, in an effort to get Mike back in school. She learned nothing more than did Mike and Dan when they went downtown to see Mr. Johnson. He told them that he affirmed Mr. Stewart's action and that the only recourse for the boys was to try to obtain admittance to another school. Johnson said that both the sending and receiving principal had to approve a transfer and that Mike and Dan should just work hard at seeing principals until they found one that would accept them. Johnson suggested that they try Davis High School and Madison High School, even though both schools are on the other side of town from Sharpstown. Johnson also offered to try and help the boys in their effort to find a principal who would accept them but that he could not help them in any other way even though he had

the authority to overrule Mr. Stewart's action. Johnson admitted to Mike and Dan that he was afraid their chances of getting into another school were slim.

II.

Plaintiffs' complaint charged that these students were expelled from school in violation of their rights to freedom of speech and to due process of law as provided for in the First and Fourteenth Amendments to the United States Constitution. Plaintiffs also prayed for the entry of a judgment declaring unconstitutional the rules and regulations of the Houston Independent School District which were employed to suspend these students on the grounds that they are vague and overbroad.

The defendants responded by arguing that their actions were justified in that the "newspaper" created such "disruption" to the school's daily operation that the result was "complete turmoil" among students. Further, defendants contend that the contents of the "newspaper" amounted to an immediate advocacy of and incitement to disregard school administrative procedures and policies and that the paper was calculated to encourage insubordination to school authority on the part of other students. Defendants assert that their actions were justified in light of information that had been received to the effect that two so-called radical organizations, the Students for a Democratic Society and its high school affiliate, the Student Union for Democratic Schools, were attempting to "infiltrate" Houston high schools.

Shortly after this suit was filed, this court entered a Temporary Restraining Order which required that the students be reinstated in school until a hearing could be held and the factual circumstances surrounding the expulsion explored.

On April 9, 1969 hearing began to consider the plaintiffs' application for entry of a preliminary injunction. At that time an Order was entered pursuant to Rule 65(a)(2), Federal Rules of Civil Procedure, that the action on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction in an effort to expedite the final determination of the case.

Before testimony began, defendants presented its motion to dismiss in whole or in part and its plea in abatement. Both motions were carried along with the case. After five days of trial, this court entered its informal Findings of Fact and granted a Preliminary Injunction to the effect that the two minor plaintiffs were to remain in school without the imposition of disciplinary action regarding the publication and distribution of the "newspaper." Further, defendants were enjoined from disciplining the minor plaintiffs for the publication or distribution of other written materials away from school premises. (see Appendix B.)

The court has also considered defendants' motion to abate this action until plaintiffs have exhausted all available administrative remedies. Defendants' motion is overruled on two grounds: (1) The doctrine of exhaustion of administrative remedies is not ap-

plicable to an action under Section 1983, Title 42, United States Code. *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pope*, 385 U.S. 167 (1961). See also *General Order of Student Discipline*, 45 F.R.D. 133-143-44 (W.D. Mo. 1968); (2) It also appears that the two minor plaintiffs did in fact avail themselves of all the administrative remedies available to them. Assistant Superintendent Johnson testified that the boys' only recourse after their suspension was to attempt to persuade a high school principal to accept their transfer. The evidence is clear that the minor plaintiffs and their parents made reasonable attempts but were unsuccessful. Johnson had said he thought their chances were slim and apparently he was correct. It does not appear that an appeal to the central administrative office was a procedure available to plaintiffs. But since Johnson informed Mike and Dan that he concurred in Mr. Stewart's ruling, it appears that such a procedure would probably have been fruitless.

Action was deferred by the court on defendants' motion to dismiss. The first ground urged in support of this motion is that this court has no jurisdiction over that part of the case dealing with the alleged depriviation of procedural due process in the absence of any denial of substantive constitutional rights by defendants. The only authority presented by defendants is the recent decision of the United States Court of Appeals for the Eighth Circuit in *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). That case concerned the due process claims of certain teachers who were dismissed from

their jobs without having received minimal standards of procedural due process. The instant case involves the dismissal of students from school—an entirely different matter. A school board's employment practices are irrelevant considerations in an analysis of its relationship with its students. Since this court is aware of no other reason why plaintiffs may not properly assert a lack of due process in the procedure followed in dismissing these students from school, the defendants' motion to dismiss that part of the complaint is denied. *See e.g. Kelley v. Metropolitan Bd. of Education,* 293 F.Supp. 485 (M.D. Tenn. 1968).

Defendants have also moved to dismiss that part of the complaint which has been designated a class action. Plaintiffs have requested that they be allowed to maintain this suit as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. Plaintiffs have designated a class composed of all the students presently enrolled in the secondary schools of the Houston Independent School District. Defendants contend that his designation is not proper under Rule 23 because the majority of Houston secondary students are not in sympathy with the views or methods of these plaintiffs and are, therefore, not "similarly situated." This contention misses the point. All of the members of this class are subject to the same regulations of the Houston School District which have been alleged to be unconstitutional on their face and as applied. It is irrelevant to speculate how many students might need to invoke the first amendment as protection from official sanctions; the fact that each member is subject to the same specific sort of depriviation of constitutional rights as the

representative parties is enough. This case is clearly maintainable as a class action pursuant to Sections (a) and (b) (2) of Rule 23. See generally *Wright, Class Actions*, 47 F.R.D. 169 (1969).

During the period allowed to counsel for both parties for preparation of formal briefs on plaintiffs' claim for permanent injunctive relief, defendants filed a second motion to dismiss. Counsel argues in this new motion that since the minor plaintiffs did return to Sharpstown High School as a result of this court's orders and since both did graduate from that school at the end of the Spring term of 1969, that their causes of action are now moot. Further, defendants argue that inasmuch as the "representative parties" of the class action no longer have a justiciable dispute with defendants, these minor plaintiffs can no longer continue to properly represent this class within the meaning of Rule 23.

This court does not agree that the minor plaintiffs' causes are moot. The complaint in this cause expressly requested that the defendants be enjoined from maintaining any formal or informal record reflecting that disciplinary action was ever taken against these students for the acts in question. This question has not been resolved nor was action on it appropriate until the case became ripe for determination of the other prayers for permanent relief. A closely analogous case is *Carafas v. La Vallee*, 391 U.S. 234 (1968) in which the Supreme Court considered the contention that a petition for habeas corpus became moot when the petitioner was unconditionally released from prison:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens (which) may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." Fiswick v. United States, 329 U.S. 211, 222, 91 L.Ed. 196, 203, 67 S.Ct. 224 (1946). On account of these "collateral consequences," the case is not moot. Ginsberg v. New York, 390 U.S. 629, 633-634, n.2, 20 L.Ed. 2d 195, 200, 88 S.Ct. 1274 (1968).

Id. at 237.

These minor plaintiffs may well suffer "collateral consequences" unless it is resolved by the final judgment of this court that they were wrongfully expelled. One specific example of such consequences would be the increased difficulty in obtaining admission to a college or university that these students might well encounter. The severe disciplinary action taken against these students amounts to a blot on their scholastic records that might well haunt them for years to come. Plaintiffs are entitled to a judgment one way or the other on the propriety of their conduct and at the same time the court is obliged to evaluate the actions of school officials. This evaluation directly involves the designated class as a whole and this court considers these minor plaintiffs to be proper and adequate representatives. Defendants' second motion to dismiss is overruled.

III.

In February of this year, the Supreme Court clarified the constitutional principles governing the rights of school pupils to register dissenting opinions at school and the need for maintaining standards of discipline in public schools. In *Tinker v. Community School District,* 393 U.S. 505 (1969) the Court reversed the expulsion of a group of high school and junior high students who wore black armbands to class as a silent protest to this Nation's involvement in the war in Viet Nam. The majority opinion makes it abundantly clear that students do not shed their constitutional rights when they enter the high school campus:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit said, school officials cannot suppress "expression of feelings with which they do not wish to contend." Burnside v. Byars, supra, at 749.

Id. at 511.

Tinker very clearly applies the first amendment in its full force to the high school campus:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Id. at 509.

However, as has always been the Court's view of the first amendment, see *Cox v. Louisiana*, 379 U.S. 536 (1965), under *Tinker*, speech and assembly are subject to reasonable restrictions as to time, place, manner and duration:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school. It is also an important part of the educational process. A student's rights therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so "without materially and substantially interfering with appropriate discipline in the operation of the school" and without colliding with the rights of others. Burnside v. Byars, supra, at 749. But conduct by the student, in class

> or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech.

Id. at 512-13.

These limitations are closely analogous to the limitations that have been placed on demonstrations and pickets. Though they are exercising first amendment rights, demonstrators will not be allowed to interfere with normal automobile or pedestrian traffic on public streets or sidewalks because it is also a fundamental right of every citizen to travel free from unreasonable physical interference by others. Traffic is properly regulated by the police because it is said to be a legitimate interest of the public as a whole. See *Cameron v. Johnson*, 390 U.S. 611 (1968); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965).

The schools, then, should be able to control those activities which relate to or affect education. As the judges of the Western District of Missouri put it their *General Order On School Discipline*, 45 F.R.D. 133, 145 (1968) "In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution."

Clearly then, freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential *on school premises* so long as it does not unreasonably interfere with

normal school activities. Administration can properly regulate the times and places within the school building at which papers may be distributed. Obviously, the first amendment does not require that students be allowed to read newspapers during class periods. Nor should loud speeches or discussion be tolerated in the halls during class time. A proper regulation as to "place" might reasonably prohibit all discussion in the school library. Administration may not, however, apply regulations as to "time" or "place" or "manner" in a discriminatory fashion. In *Tinker*, the school authorities did not prohibit the students from wearing all symbols of controversial significance, but only arm bands, while allowing such things as political buttons. One student even wore a Nazi Iron Cross and was not reprimanded. The Court said:

> Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.

393 U.S. at 511.

It is also clear that if a student complies with reasonable rules as to times and places for distribution within the school, and does so in an orderly, nondisruptive manner, then he should not suffer if other students, who are lacking in self-control, tend to over-react thereby becoming a disruptive influence. Mr. Justice Douglas' famous quote from *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948) is particularly important to this issue:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

So, a student has the right to express himself while on school premises in a non-disruptive manner, subject to reasonable limitations concerning "time," "place," "manner" and "duration."

But what of off-campus activities? It is not clear whether the law allows a school to discipline a student for his behavior during free time away from the campus. *Compare, Linde, Campus Law: Berkeley Viewed From Eugene,* 54 *Calif. L. Rev.* 40, 50-51 (1966), *with, General Order on Student Discipline,* 45 F.R.D. 133, 145 (W.D. Mo. 1968). In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal

laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.

Arguably, misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day. Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power to be questionable.

However, under any circumstances, the school certainly may not exercise more control over off-campus behavior than over on-campus conduct. Serious disciplinary action concerning first amendment activity on or off campus must be based on the standard of substantial interference with the normal operations of the school.

These principles apply directly to this case. There is no question that these minor plaintiffs were engaged in acts of expression protected by the first amendment; indeed, excepting only oral expression, the publication of a "newspaper" is first amendment activity in its purest form.

The crucial issue, then, is a factual question; did these two students materially and substantially interfere with the requirements of appropriate discipline in the operation of Sharpstown Junior/Senior High School? After hearing all the evidence, this court concluded that the distribution of the *Pflashlyte* had no such effect. Since then, a careful examination of the

transcript of the testimony and of the briefs of counsel has not changed that opinion. The interruptions of class periods caused by the "newspaper" were minor and relatively few in number. It is of special significance to note that during the nine school days between the first appearance of the *Pflashlyte* and the expulsion of Mike and Dan, only *one* student "discipline card" was filled out at Sharpstown High which was in any way related to the "newspaper." Moreover that one student was also being reprimanded for several other infractions as well as possession of a *Pflashlyte*.

So called "underground" newspapers have sprung up in high schools all over the United States during the past year. Many have used harsh language and have advocated violence. The *Pflashlyte* was primarily intended as a discussion and comment upon problems affecting student-administrator relations. (see Appendix A.). The writers are generally critical of school policy but the criticism is on a mature and intelligent level. In the introductory issue, it is argued that improvement in the students' relationship with school administrators can be accomplished only through the "sincere cooperation of all factions." "Confrontation" it is stated, "would result in regression rather than progression." These are not the words of one who is calculating to "incite insubordination."

Defendants' objections are strongest toward a paragraph in the first issue entitled *Pflashlyte* which is captioned "Edmund's Thoughts." Plaintiffs testified that this was intended to be a sarcastic "speech" by a hypothetical administrator. Although it does

appear to hold school officials up to ridicule, its content does not even approach the "fighting words" of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which are not protected by the first amendment since they are said to inflict injury by their very utterance. These two young men are subject to laws governing libel, slander and obscenity but it can hardly be concluded that his paragraph amounts to libel or that it is obscene. It is surely no more obscene than the sign hanging in the office of the school athletic coaches which in substance stated [p]ut your heart in this country or get your ass out of it" by use of small pictures of a heart and a donkey substituted for the words they symbolized. The contents of all three issues of the *Pflashlyte* are plainly the sort of speech protected by the first amendment.

The manner in which the paper was distributed by these two students could by no stretch of the imagination be said to have created a state of "turmoil." Both boys were off-campus, they did not hand out papers during school time and they even went so far as to encourage students to not take the paper into the school building and to keep it out of sight if they did do so.

If it was the disruption of classes and normal school activities that concerned school officials after the *Pflashlyte* was distributed, then why were those not disciplined who were disruptive? Apparently those unknown persons who placed issues in sewing machines and in paper towel dispensers have gone unnoticed. It is their misconduct in the manner in

which they distributed the paper which should have been stopped, not the idea of printing newspapers itself.

Defendants attempt to justify their actions by arguing that an organized student movement is attempting to "overthrow" the Houston school system and that the elimination of this "newspaper" and these students was necessary to prevent further "infiltration." The court will resist the temptation to comment upon this position. At their very best, these considerations are irrelevant. These two boys have not advocated the overthrow of the United States Government or of the Houston school district. Indeed, their most subversive thoughts were about potted plants.

It appears that Mike and Dan were disciplined because school officials disliked the *Pflashlyte's* contents. The Constitution prohibits such action.

IV.

Plaintiffs also contend that the procedure employed by Stewart in expelling Mike Fischer and Dan Sullivan does not meet minimal standards of procedural due process of law. In the important case of *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 385 U.S. 930 (1961), the United States Court of Appeals for the Fifth Circuit held that school officials are clothed with governmental authority and that if their disciplinary actions can substantially injure an individual, such acts must comply with minimal procedural requirements of due process of law. The court outlined these requirements:

> We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct . . . . They, should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending on the circumstances of the particullar case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required . . . . Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the parties.

Id. at 158-59. See *Kelley v. Metropolitan County Bd. of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Knight v. State Bd. of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961); *General Order on Student Discipline*, 45 F.R.D. 133 (1968).

The high school student perhaps even more than the university student needs careful adherence to concepts of procedural fairness and reasonableness by school officials. See *Kelley v. Metropolitan Bd. of Education, supra.* As minors they occupy a different status under the law and often are too inexperienced or immature to know how to protect themselves against charges of misconduct. Parents or guardians have legal obligations to children of high school age and common sense dictates that they should be included in any disciplinary action against their children which could result in severe punishment. Indeed it may be even more crucial that proper written notice of charges be provided to parents for often they do not know what has transpired at school. When severe discipline is contemplated—either expulsion or suspension for a substantial time—the student and his parents should be given ample time before the hearing to examine the charges, prepare a defense and gather evidence and witnesses. And, it goes without saying that the disciplining official should endeavor to maintain a neutral position until he has heard all of the facts.

Mr. Stewart testified that in his judgment the presence of the "newspaper" was not "in the best interests of the school" under any circumstances. He also said that he resolved to expel the students who were responsible as soon as possible. In the face of such a predetermination, it appears that Stewart saw no read need to afford the students and their parents a chance to present a defense. Mike Fischer's mother was informed over the phone that Mike was being

expelled before Mike himself was ever advised that any disciplinary action would be taken. This was the first notice from the school to either Mr. or Mrs. Fischer that Mike was in trouble.

Mrs. Sullivan was asked to come to Mr. Stewart's office for a conference and at that time she was advised that Dan was to be expelled. The purpose of the conference appears to have been only to inform Mrs. Sullivan of the punishment. Both boys were called in for a conference with the principal and assistant principal on the Friday before their expulsion. However, neither was advised that disciplinary action would be taken nor was it made clear exactly why the "newspaper" violated "school regulations."

The suspension of these students provides a practical illustration of the unfairness so often accompanying the imposition of sanctions without adherence to reasonable standards of procedural due process. If Stewart had inquired into the boys' motives and reasons for publishing a critical newspaper then perhaps he would not have acted so hastily. But for some reason the lines of communication were closed. This court, however, considers it the duty of school officials to create and maintain these lines through reasonable and fair procedures whenever severe disciplinary action is considered appropriate.

In light of this court's conclusions that defendants have deprived plaintiffs of their rights under the first amendment and have denied plaintiffs due process of law, plaintiffs are entitled to judgment that they were wrongfully expelled from Sharpstown High School.

V.

Finally, plaintiffs allege that certain regulations of the Houston Independent School District are unconstitutional under the Supreme Court's "void-for-vagueness" doctrine. This prayer is presented as a class action on behalf of all secondary students of the Houston Independent School District. Plaintiffs seek declaratory relief and injunctive enforcement of their judgment.

The Supreme Court's "void-for-vagueness" doctrine has developed two distinct concepts. A statute is scrutinized first to determine if it is "overbroad"; could a reasonable application of its sanctions include conduct protected by the Constitution? See *Stromberg v. California*, 283 U.S. 359 (1931); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1941). *See generally, Amsterdam, The Void for Vagueness Doctrine*, 109 *Pa. L. Rev.* 67 (1960).

A statute must also satisfy the "vagueness" standard of *Connally v. General Construction Co.*, 269 U.S. 385 (1926):

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . .

See *Zwickler v. Koota*, 389 U.S. 241 (1967).

In their *General Order on Student Discipline*, 45 F.R.D. 133, 146-47 (W.D. Mo. 1968), the judges of the

Western District of Missouri adopted the following view on this issue:

> Outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education.
>
> For this reason, general affirmative statements of what is expected of a student may in some areas be preferable in higher education. Such affirmative standards may be employed, and discipline of students based thereon . . .
>
> The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional [887] circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct, relevant to the lawful missions of higher education, ordinarily should be determined by recognized educational standards.

However, in the case of *Soglin v. Kauffman*, 295 F.Supp. 978, 990 (W.D. Wis. 1968) the court expressly rejected this view: "I cannot agree that university students should be deprived of these significant constitutional protections on so slender a showing." The court concluded that:

> The constitutional doctrines of vagueness and overbreadth are applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students, and that a regime in which the term "misconduct" serves as the sole standard violates the due process

clause of the Fourteenth Amendment by reason of its vagueness, or, in the alternative, violates the First Amendment as embodied in the fourteenth by reason of its vagueness and overbreadth.

Id. at 991.

This court is persuaded by the *Soglin* decision. And in this court's judgment, these fundamental concepts of constitutional law must be applied "in some measure" even to high schools. The "measure" should reach only to rules the violation of which could result in expulsion or suspension for a substantial period of time. When faced with such drastic consequences, a high school student has no less a right to a clear, specific normative statement which does not infringe on free expression than does a university student or possibly even the accused in a criminal case. If the punishment could be this severe, there is no question but that a high school student as well as a university student might well suffer more injury than one convicted of a criminal offense. School rules probably do not need to be as narrow as criminal statutes but if school officials contemplate severe punishment they must do so on the basis of a rule which is drawn so as to reasonably inform the student what specific conduct is proscribed. Basic notions of justice and fair play require that no person shall be made to suffer for a breach unless standards of behavior have first been announced, for who is to decide what has been breached?

It is also clear that severe punishment may not be based on a rule which could reasonably be construed

to embrace conduct protected by the first amendment. In *Tinker* the Court stated:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone both or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

393 U.S. at 513.

At the conclusion of the evidentiary hearing in this case the parties entered the following stipulation:

> The only written rule or regulation of the Houston Independent School District concerning the private publication and distribution of written material by students in secondary schools newspapers which are not published in the name of the school and which do not purport to be published under the auspices of any school is as follows:
>
> > The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command.

It was further stipulated by the parties that Mr. Stewart had not made or announced any rule concerning the private publication or distribution of newspapers at Sharpstown Junior/Senior High School before the facts in question arose.

Lastly, the following was stipulated:

> [T]he rule . . . . [quoted above] is construed by responsible officials of the Houston Independent School District to prohibit the type of publication and distribution engaged in by Michael Fischer and Dan Sullivan in February and March of 1969.

Since Mr. Stewart had not announced any rules regarding the private publication and distribution of newspapers since he testified that he based his disciplinary action upon the rule quoted above, it must be assumed that this was the only standard available to students by which they could guide their conduct. The rule is, therefore, a proper subject for evaluation as to its vagueness and overbreadth.[1]

---

1. Although neither party has raised or briefed the issue, it appears highly questionable to this court whether the Board of Trustees of the Houston Independent School District may properly delegate the power to expel and suspend for a substantial period of time to the principal of a school. Article 2904, Vernon's Annotated Texas Statutes, provides that the trustees of an independent school district shall have the power to suspend a pupil found guilty of "incorrigible conduct." It does not appear that Texas law expressly grants such power to principals and given the nature of Texas independent school districts as statutory creations and given the rule of compulsory attendance, it seems doubtful that the authority to expel or suspend for a substantial time may be vested in any body other than the trustees of the district. *See also* Article 2780, Vernon's Annotated Texas Statutes.

Little can be said of a standard so grossly overbroad as "in the best interests of the school." *Soglin v. Kauffman*, 295 F.Supp. 978, 991 (W.D. Wisc. 1968). It cannot be contended that it supplies objective standards by which a student may measure his behavior or by which an administrator may make a specific ruling in evaluation of behavior. *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965). It patently "sweeps within its broad scope activities that are constitutionally protected, free speech and assembly." *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

This is not meant in criticism of defendants. Generalities such as this one have been accepted for years as the proper sort of standard for our "unique educational environment." However, *Tinker* has tolled the beginnings of change. As Judge James Doyle wrote in *Soglin v. Kauffman*, 295 F.Supp. 978, 988 (W.D. Wisc. 1968):

> I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding. The world is much with the modern state university. Some find this regrettable, mourning the passing of what is said to have been the old order. I do not share this view.

The high school too is changing and generalities can no longer serve as standards of behavior when the right to obtain an education hangs in the balance.

This regulation is unconstitutional for both "vagueness" and "overbreadth" and plaintiffs are entitled to a declaratory judgment to that effect. *See generally* the article by Professor Charles Alan Wright entitled *The Constitution On the Campus*, 22 *Vand. L. Rev.* 1027 (1969).

Having concluded that defendants' regulation is overbroad, it falls upon the court to determine what equitable relief is proper protection for plaintiffs and their class. The determination of overbreadth coupled with the threat of further improper enforcement in the future clearly tends to "chill" the exercise of first amendment freedoms by students in Houston schools. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *NAACP v. Button*, 371 U.S. 415 (1963). Such further improper enforcement will result in immediate and irreparable injury to plaintiffs' class, and they will be without an adequate remedy at law. The class is entitled to permanent injunctive relief preventing the use of the void regulation by defendants in the future.

In this court's judgment, further equitable relief is required by the facts of this case so as to provide adequate protection for plaintiffs' class. A permanent injunction will issue prohibiting the defendants from imposing serious disciplinary sanctions, in the absence of precise and narrowly drawn regulations, upon students who write, print, distribute or otherwise engage in the publication of newspapers either on or off of school premises during either school hours or non-school hours unless such activities materially and substantially disrupt the normal

operations of the school. 42 U.S.C.A. §1983; 28 U.S.C.A. §1343(3).

Defendants will also be permanently enjoined from expelling or suspending for a substantial period of time secondary school students in the Houston school district who are guilty of any misconduct without compliance with minimal standards of procedural due process: (1) formal written notice of the charges and of the evidence against him must be provided to the student and his parents or guardian, (2) formal hearing affording both sides ample opportunity to present their cases by way of witnesses or other evidence, and (3) imposition of sanctions only on the basis of substantial evidence.

In 1943, Mr. Justice Jackson provided the principles which sustain this Court's decision today:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Counsel for plaintiffs will submit a proposed judgment and injunction immediately. It will be submitted to counsel for defendants for approval as to form.

The Clerk is directed to file this Memorandum Opinion and provide true copies to counsel of record.

Done at Houston, Texas, on this the 17th day of November, 1969.

WOODROW SEALS
United States District Judge

Memorandum Opinion and Order — June 23, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Civil Action No. 69-H-266

DAN SULLIVAN, by next friend,
DANIEL H. SULLIVAN, et al.,

plaintiffs,

—against—

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

defendants.

This action is before the court on movant's motion for an order requiring respondents to show cause why they should not be adjudged in contempt of this court for respondents' alleged violation of a permanent injunctive decree issued by the court under date of December 30, 1969; further, on movant's motion for supplementary injunctive relief to effect the better implementation of the court's previous injunction; and further, on movant's motion for damages sustained as a result of respondents' allegedly contemptuous conduct.

Summary of Facts

In 1969, Dan Sullivan and Michael Fischer, two 12th grade students of the Houston Independent School District, were suspended from Sharpstown Junior-Senior High School because of their involvement in the production and distribution of a certain publication which they called the *Pflashlyte* and which criticized school officials. Shortly after their suspension, the students filed a complaint in this court pursuant to 42 U.S.C. §1983, in which they sought an order compelling their reinstatement, and

in which they further sought, both for themselves and as representatives of the class of persons aggrieved, injunctive and declaratory relief against certain regulations of the Houston Independent School District, all pursuant to 28 U.S.C. §2201 and Rule 23, Federal Rules of Civil Procedure.

After a lengthy trial the court, in a Memorandum Opinion under date of November 17, 1969, 307 F. Supp. 1328 (S.D. Tex. 1969), made, *inter alia*, the following findings of fact and conclusions of law:

1. That the minor plaintiffs, Sullivan and Fischer, qualified as proper representatives of the class whose interest they sought to protect;

2. That minor plaintiffs were disciplined because school officials disliked the contents of their publication and that discipline for such reason is constitutionally impermissible;

3. That the procedures utilized to effect the suspension of minor plaintiffs failed to provide them with those minimal safeguards of due process mandated by the fourteenth amendment to the United States Constitution;

4. That the School District's regulation under which minor plaintiffs were suspended[1] was constitutionally void for both "vagueness" and "overbreadth".

On December 30, 1969, this court issued its "Permanent Injunction Decree and Declaratory Judgment," which, after redressing the particular grievances of the minor plaintiffs, Sullivan and Fischer, granted

the following relief to all members of the class of persons which Sullivan and Fischer had been adjudged to represent:

> The named defendants, their successors in office, and their present and future agents, servants and employees and all persons in active concert or participation with them who receive actual notice of this permanent injunction decree are hereby permanently enjoined and restrained from promulgating, maintaining or enforcing any regulation, plan or policy designed to prohibit absolutely the publication or distribution of all newspapers or other similar expressions of opinion or statements of fact by covered students on school premises. In the event that the defendant trustees, or their successors in office, shall determine to promulgate, maintain or enforce or cause the promulgation, maintenance or enforcement of any regulation, plan or policy designed or calculated to regulate the production or distribution of newspapers or other similar written expressions of opinion or statements of fact by covered students on school premises, they and each of them are permanently restrained and enjoined from doing so except by written rule to be furnished to each covered student to which it applies, or to be posted on a bulletin board or other place accessible to the covered students at each school so they may know or have notice of the existence thereof. The said defendants and their successors in office are further permanently restrained and enjoined from the promulgation, maintenance and en-

forcement of any such rule unless the following conditions are met:

1. The rule must be specific as to places and times where possession and distribution of published materials is prohibited.

2. The rule must be understandable to persons of the age and experience of covered students.

3. The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject any written material being distributed subject to the rule.

4. The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal classroom activity or normal school function. As used herein, "normal classroom activity" means organized educational activity of students under the direct supervision of a teacher or a school administrator. Such phrase includes student activity in library areas, physical education classes, whether conducted indoors or outdoors, official assemblies and other similar gatherings. "Normal school function" means such activities as athletic contests, band concerts, school plays and scheduled on-campus lunch periods. Further, the peaceful, orderly, non-

coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom activity or normal school function as those phrases are hereinabove defined.

5. The rule must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material, provided, however, that defendants and their successors in office may prohibit or punish the publication or distribution of obscene material or of libelous material for which a cause of action may exist in some person.

It is further ORDERED, ADJUDGED and DECREED that the defendants and their successors in office, and their present or future agents, servants and employees, are permanently restrained and enjoined from imposing substantial discipline upon any covered student who is subject to the regulatory authority of defendants, unless they shall observe and follow the procedures hereafter set forth. "Substantial discipline" as herein used is hereby defined to include any expulsion or suspension from classes or attendance at school for more than three days, and any expulsion or suspension from classes or attend-

ance at school which is not specifically limited to three days or less at the time of imposition. The procedures herein required shall include at least the following:

1. The covered student and at least one of his parents or his guardian shall be furnished, either in person or by mail directed to the student's last known address, with written notice of the charges and of the nature of the evidence against such covered student.

2. The covered student and at least one of his parents or guardian shall be offered a formal hearing after sufficient time to prepare a defense or reply, at which hearing evidence in support of the charge shall be presented by school officials and the affected covered student or his parent or guardian shall have ample opportunity to present any defense or reply.

3. The decision of school officials to impose such discipline shall be based upon a dispassionate and fair consideration of substantial evidence that the covered student committed the acts for which discipline is to be imposed and that such acts are in fact a proper reason for such discipline.

Pursuant to the plaintiffs' prayer for declaratory relief, it is the judgment of this court that:

1. That the First and Fourteenth Amendments to the Constitution of the United States apply to the administration of the public school by the defendants, their successors in office, their agents, servants and employees and inure to the benefit

of the class of covered students as that term is herein defined, now or hereafter enrolled in such schools. Therefore, the absolute prohibition of all publication and distribution of printed and written material by students is unconstitutional.

2. The Fourteenth Amendment to the United States Constitution prohibits the defendants from imposing discipline upon covered students on the basis of claimed violations of rules or regulations which are so vaguely worded that students subject to such rules and regulations, although conscientiously desiring of abiding by them, would nevertheless be in doubt about the boundary line between permitted and prohibited conduct.

3. For both of the foregoing reasons defendants' rule or regulation as follows:

THE SCHOOL PRINCIPAL

> The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command.

is hereby declared to be null and void upon its face. Further, it was stipulated by the parties that this rule is the "only written rule or regulation of the Houston Independent School District concerning the private publication and distribution of written material by students in secondary schools of newspapers which are not published in the name of any school and which do not purport to be published under the auspices

> of any school . . . . And that "this rule is interpreted by responsible officials of the Houston Independent School District to prohibit any such publication [of the type described in the just quoted stipulation] which is either 'not in the best interests of the school' or which is 'disruptive.'" And that the foregoing rule was "construed by responsible officials of the Houston Independent School District to prohibit the type of publication and distribution engaged in by Michael Fischer and Dan Sullivan in February and March of 1969."

Subsequent to the entry of this court's permanent injunction, the Board of Trustees of the Houston Independent School District formulated new policies regarding student distribution of printed matter. The Board appointed a committee of business and profession leaders, students, teachers and attorneys, whose task it was to recommend policies that would conform to this court's injunction.[2] Those recommendations were duly adopted by the Board of Trustees.[3]

On the morning of October 20, 1970, prior to the beginning of classes, Paul Kitchen, a junior at Waltrip Senior High School, and a member of the class of persons protected by the court's injunction and declaratory judgment of December 30, 1969, was standing near an entrance to, but not actually on the property of, Waltrip High School. Paul was selling SPACE CITY!, a newspaper in general circulation in Harris County. Most of Paul's customers were students coming onto the Waltrip campus.

After Paul had made a number of sales, he

was confronted by Gordon Cotton, the principal at Waltrip, who bought a copy of the newspaper, read a portion of the second page, and informed Paul that the latter was violating School Board policy concerning the distribution of literature on campus. Later that morning, Paul was called in for a conference with Mr. Cotton, who told Paul that he was being suspended pending a conference with his parents, and gave Paul a suspension card on which to obtain the signatures of his teachers. Mr. Cotton also telephoned notice of the suspension to Paul's father, Mr. A. P. Kitchen, and requested that Mr. Kitchen come to the school for a conference. Mr. Kitchen replied that he would be unable to attend such a meeting until the following Monday, October 26, and the conference was then scheduled for that date. Meanwhile, Paul returned to Mr. Cotton's office to deliver the signed suspension card; as he was leaving, Paul spoke the word "goddamn" in a loud voice and slammed the door to Mr. Cotton's office.[4]

Paul returned to the Waltrip campus several times during the following week, and was reprimanded on each occasion by a teacher or administrator because of this presence on campus while under suspension. On the morning of October 26, Paul was again selling SPACE CITY! near the entrance to Waltrip. Informed of this new defiance, Mr. Cotton rushed to the scene and presented Paul with a copy of the School Board regulations regarding student distribution of literature. Mr. Cotton threatened Paul with arrest if he persisted in violation of Board policy. Thereupon, Paul used the word "fuck" in the presence of Mr. Cotton; Mr. Vann, a teacher accompanying the prin-

cipal; and a number of students who were observing the confrontation. At this point, the parties dispute the precise content of Paul's language, but all agree that he employed the common Anglo-Saxon vulgarism for sexual intercourse.

Paul was arrested, taken to the police station, and later released. Mr. Kitchen, upon being apprised of the turn of events, decided to forego his scheduled meeting with Mr. Cotton and instead to seek legal assistance. On this same date, October 26, Mr. Cotton mailed to Paul's parents a written notification of Paul's suspension for the remainder of the semester.[5]

On October 29, Mr. Cotton conducted a "hearing" in his office to determine the propriety of the suspension action. Paul was accompanied by his attorney, Mr. Eric Nelson. Mr. Cotton affirmed his previous decision to suspend Paul, on the basis of Paul's violation of School Board policy and for the additional reason of Paul's use of language deemed unbecoming by Mr. Cotton.

Mr. Cotton's decision was appealed to an assistant superintendent, Mr. Britton Ryan, and on November 9, that official conducted an evidentiary hearing at which Paul, his father, and his attorney were present. Mr. Ryan upheld Mr. Cotton's decision, and Mr. Ryan's ruling was in turn reviewed and sustained by the Deputy Superintendent for Secondary Schools and by the Superintendent for Instruction and Administration.

On November 23, Paul and his father initiated the present action. The following day, this court issued a temporary restraining order directing that Paul be

allowed to return to classes pending a hearing on the merits. Paul returned to school on November 25. The court suggested that movant exhaust his administrative remedies by appealing to the Board of Trustees. The Board held a formal hearing, complete with attorneys, witnesses and court reporter, on December 16. The Board affirmed Mr. Cotton's decision to suspend Paul, but reduced the penalty from a suspension for the entire fall semester to a suspension from October 20 to November 25,[6] plus an additional two weeks.[7]

I

The Nature of the Proceeding

At the outset, it is necessary briefly to consider the nature of the instant proceeding. Respondents emphasize the language of the court in its previous injunction, which declared that respondents are prohibited from making and enforcing any regulation "unless the following conditions are met." Respondents contend that, by enacting their revised regulations, they have complied with all terms of the court's injunction and are therefore released from its further operation.

The court would be remiss in its duty to uphold the law and the Constitution, were it to allow respondents so easily to remove themselves from the operation of the injunction. But the reply to this semantic quibbling requires no jurisdictional overreaching. For, as the court will demonstrate below, respondents have not as yet complied with the terms of the previous injunction. Such conclusion obviates the necessity

of examining the technical effect of "unless," since the conditions precedent of that "unless" were never fulfilled.

Respondents have also declared that the instant proceeding is not properly within the realm of contempt, and is rather in the nature of a new and independent proceeding. Such a view is mistaken. Movant here seeks to have respondents declared in contempt of court for allegedly violating the court's injunction in a manner inuring to movant's injury. If, in rendering a decision on the contempt issue, the court finds that its injunction contains provisions that are subject to frequent misconstruction and that are likely to necessitate further court intervention unless clarified, the court reserves the right, and so informed both parties at the outset of this proceeding, to promulgate an additional and supplementary injunction that will better enable all parties to follow the court's instructions. The court specifically declines, however, to modify any portion of its previous injunction.

II

The Crisis of Education

In the past decade, the public school has become a battleground, dominated by the effort to achieve the unitary school system,* which struggle has increasingly yielded the spotlight to the demands of students for full recognition of their rights as citizens of the United States. Many students have witnessed a slow but steady confirmation of those basic American liberties which non-students take for granted. In most

instances, however, the school has not quietly or voluntarily yielded up its enormous power over the lives of its students. Sometimes, progressive boards of education have acted to redress the students' ancient grievances. But most often, and with increasing frequency, the federal court has been the only institution willing to guarantee the constitutional rights of students.

Such buck-passing has engendered fear and resentment among parents, teachers, and all levels of the school hierarchy. It has, however, provided school officials with a convenient scapegoat on which to blame their own deficiencies.

Charles Silberman has written that "the most important characteristic schools share in common is a pre-occupation with order and control." Charles Silberman, *Crisis in the Classroom* (New York: Random House, 1970), at 122. Teachers and administrators speak of a crisis of authority, a breakdown of discipline in the public school, generated, it is said, by the controls imposed on them by courts totally unacquainted with the day-to-day problems that confront school officials. The panacea for permissiveness is power to the principal.

There is much to suggest, however, that the solution to the crisis of education may not be so deceptively simple. More control, according to George Dennison,[9] is an inadequate if not self-defeating response:

> "The crisis in public education, like the hastening dissolution of other of our social institutions, creates anxiety and doubt, and we respond as

anxious people do: we try to impose order by force, imagining that if we can obliterate the symptoms, we will have cured the disease. We speak increasingly of control, as if we feared that everything would collapse into nothing if we let loose our (illusory) hold on things. And so I have been urging one simple truth through all these pages: that the educational function does not rest upon our ability to control, or our will to instruct, but upon our human nature and the nature of experience." George Dennison, *The Lives of Children* (New York: Random House, 1969), at 246.

The result of such efforts to control students is to defeat creativity—the purported goal of the educational system:

"The function of education has never been to free the mind and the spirit of man, but to bind them; and to the end that the mind and spirit of his children should never escape Homo sapiens has employed praise, ridicule, admonition, accusation, mutilation, and even torture to chain them to the culture pattern. Throughout most of his historic course Homo sapiens has wanted from his children acquiescence, not originality. Contemporary American educators think they want creative children, yet it is an open question as to what they expect these children to create. * * * * It stands to reason that were young people truly creative the culture would fall apart, for originality, by definition, is different from what is given, an dwhat is given is the culture itself. From the endless, pathetic 'creative hours' of kindergarten to the most abstruse problems in sociology and anthropology the function of education is to prevent the truly creative

intellect from getting out of hand." Jules Henry, "In Suburban Classrooms," Beatrice and Ronald Gross, eds., *Radical School Reform* (New York: Simon & Schuster, 1969), at 77-78

Charles Silberman asks how a group can

> "'achieve enough maturity to keep itself under control' if its members never have an opportunity to exercise control? Far from helping students to develop into mature, self-reliant, self-motivated individuals, schools seem to do every thing they can to keep youngsters in a state of chronic, almost infantile, dependency. The pervasive atmosphere of distrust, together with rules covering the most minute aspects of existence, teach students every day that they are not people of worth, and certainly not individuals capable of regulating their own behavior." Silberman, supra, at 134.

Furthermore, this preoccupation with control infects the entire system:

> "The school board has no faith in the central administration, the central administration has no faith in the principals, the principals have no faith in the teachers, and the teachers have no faith in the students. * * * In such a system it seems natural not to give the principal of a school control over his budget, nor to give the teachers control over their syllabus, and not to give the students control over anything. Distrust is the order of the day." Silberman, supra, at 133.

Such an atmosphere may provide an appropriate model for an authoritarian police state, but it is

hardly conducive to the realization of a system that generates free men. Years ago, the Supreme Court recognized the principle that school authorities may not compel students to salute the flag of the United States, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Even at that early date, two decades before the first stirrings of youthful protest began to arouse the fears and indignation of their elders, Mr. Justice Jackson confirmed the libertarian ideal that no organ of the state is immune to constitutional scrutiny:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, supra, at 637.

In 1969, the Supreme Court extended to public school students the full panoply of first amendment rights, *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Finding that a regulation which prohibited students from wearing black armbands during school hours to publicize their objections to the war in Vietnam, violates their right to free speech, Mr. Justice Fortas declared that

"In our system, state-operated schools may not be enclaves of totalitarianism. * * * * The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says." *Tinker*, supra, at 511-513.

Since *Tinker*, federal courts have been deluged with a plethora of cases asserting the newly-recognized rights of students. Perhaps a majority have dealt with the highly controversial area of student dress and hair style. Although a large number of courts seem now to have affirmed the unrestricted right of each student to govern his personal appearance,[10] and an increasing number of boards of education have voluntarily bowed to the ideals of personal integrity or changing fashion, the advocates of judicial interference in this area have been obliged to invoke that ethereal "right of privacy" which sprang full-blown from the head of *Griswold v. Connecticut*, 381 U.S. 479 (1965), the "forgotten ninth amendment," or, most often, the due process clause.

In the instant case, there can be no discomfort to strict constructionists who prefer their constitutions to be literal. No right is more clearly within the protection of the first amendment, whose provisions *Tinker* has now extended to the public school, than the freedom to distribute printed matter. Throughout our constitutional history, only three exceptions have been permitted to limit this freedom, and the exceptions themselves have been narrowly construed. Two of them, obscenity and libel, were written into this court's permanent injunction. The third pro-

hibits speech which constitutes a "clear and present danger."[11]

The interpretation of two of these three limitations, obscenity and "clear and present danger," provides the matrix for the controversy confronting this court. Movant asserts that both the School Board and respondent Cotton have interpreted the court's injunction in a manner that is constitutionally invalid and that, in addition, the Board has added to the permissible regulations several nuances that extend well beyond the court's mandate.

III

Why Paul Kitchen Was Suspended

I.

Prior Restraint

Movant's principal attack on the School Board's regulation, as opposed to respondent Cotton's interpretation of the regulation, focuses upon the requirement that a student who wishes to distribute non-officially sanctioned materials on or near campus must submit

> "a copy of the publication * * * to the principal, who may take up to one school working day for the purpose of reviewing such publication before its general distribution."

Movant contends that such blanket prior restraint is permitted neither under the terms of this court's previous injunction, nor under the United States Constitution.

The court can discover no language in its previous injunction that would approve a practice rejected by the Supreme Court in 1931:

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

Prior restraint does, in fact, involve too great a risk that respondents will, unwittingly, violate that portion of the court's injunction which requires that the school regulation

> "not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material . . ."

The regulation authorizes the principal to prohibit distribution of any material, provided he obtains the agreement of

> "the attorneys employed by the Houston Independent School District"

that

> "the publication contains libelous or obscene language or advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees,"

The possibilities of abuse inherent in such a regulation are numerous, and several of them are vividly reflected in the actual events that transpired in the case at bar. Mr. Cotton deemed the publication in controversy "obscene" before seeking or obtaining the opinion of attorney or layman, and with no regard for the legal definition of obscenity; respondents' attorneys have continued to label the publication "obscene." Furthermore, the regulations, although commendably limiting the principal's decision to "one school working day," do not provide for any kind of adversary proceeding or right of appeal of a principal's decision that a publication is unacceptable. The court finds that the minimal safeguards provided by the regulation fail to obviate the risk that a publication will be scrutinized on the basis of its content, or that untrained laymen will misconstrue "obscenity" and "libel" in violation of a student distributor's first amendment rights.

In any event, prior restraint is an unnecessary and unacceptable amplification of the narrow restrictions contemplated by the court in its injunction. Prior restraint is so little favored by the United States Constitution that respondents assume an extremely heavy burden in attempting to justify its imposition.[14] Like the court in *Eisner v. Stamford Board of Education*, 314 F. Supp. 832 (D. Conn. 1970), we observe that

> "the defendants have not produced a scintilla of proof which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings." *Id.*, at 835.

Respondents have completely failed to convince the court that the present situation at Waltrip High School or at any other school of the Houston Independent School District is sufficiently perilous to warrant the practice of blanket censorship.

> ". . . the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young." *Eisner*, supra, at 836.

2.

Advocacy of Disobedience

Another of movant's objections focuses upon that aspect of the School Board's regulation which prohibits any publication which

> ". . . advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees . . ."

Such a provision was clearly not contemplated by the court's injunction and, indeed, stands in direct violation of the court's unequivocal statement that the regulation

> ". . . must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material . . ."

which statement then creates exceptions only for the categories of obscenity and libel. The only other permissible exceptions, treated below, concern the special

emergency situation, in which the presence of highly volatile literature on campus might pose a "clear and present danger," and the situation in which substantial disruption is created by the presence of the publication, and school officials, after repeated good faith efforts, have proved unable to quell such disruption by discipline of those students who provoked the disturbance.

Special provision for these highly unlikely circumstances, however, cannot salvage respondent's blanket prohibition of all publications which "advocate illegal action or disobedience to published rules." The line separating advocacy of disobedience from mere approval is a fragile one, one whose drawing we should not entrust to the hands of laymen possibly overly zealous to protect their authority. In addition, respondents might well construe "illegal action" in a manner that would enable them to proscribe virtually any unfavored publication. An editorial recommending to draftees that they resist military induction is advocating "illegal action," but it is hardly of the kind that need concern school officials. In short, this particular aspect of the regulation does not satisfy the court's previous discomfort about rules which are vague and overbroad. The court finds that that portion of the School Board's regulation prohibiting the distribution of any publication which "advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees" is constitutionally void for vagueness and overbreadth, and further, is violative of the court's previous injunction.

3.

Blanket Ban on Sales

A third objection to the Board's regulation concerns the blanket ban on sale of newspapers before the commencement of classes in the morning. The court's previous injunction stated that

> "the peaceful, orderly, non-coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom activity or normal school function as those phrases are hereinabove defined."

Respondents, however, prohibit *all* sales before school, irrespective of "disruption." Such a blanket proscription is not a legitimate exercise of the Board's power to regulate the "time, place and manner" of distribution, and it is hereby declared to be void and of no effect.

4.

Obscenity

Perhaps the major thrust of movant's attack concerns "obscenity." In this area, it becomes difficult to distinguish between the School Board regulation and Mr. Cotton's interpretation of that regulation. The court's injunction included "obscene material" within the limited category of items whose distribu-

tion the School Board and its agents may legitimately prohibit and punish. The Board's regulation, however, preferred the term "obscene language," and it is largely upon the allegedly "obscene language" which he found in a particular issue of SPACE CITY! that respondent Cotton claims to have predicated his initial decision to suspend movant.

To require a distinction between "language" and "material" is not mere quibbling. For if the Board's regulation is meant to embrace "vulgarity" within the ambit of "obscene language," the regulation is clearly violative of the court's injunction. If, however, the Board understood the distinction between "vulgarity" and "obscenity," and meant to confine "obscene language" to that which appeals to a reader's prurient interest in sex, then it is Mr. Cotton's interpretation of the regulation, embracing the merely vulgar within the scope of "obscene language" which must fail. Whether the Board or the principal, however, bears the primary responsibility for the erroneous construction, respondents have failed to demonstrate that the publication in controversy is embraced within a proper definition of "obscene material."

The Supreme Court has recognized that the power of the state to control the conduct of minors reaches beyond the scope of its authority over adults, even where there is an invasion of constitutionally protected freedoms, *Ginsberg v. New York*, 390 U.S. 629 (1968). Thus, the Court has upheld a New York statute prohibiting the sale of obscene material to minors under 17, where the statute defined obscenity

as meaning the quality of any description or representation of nudity, sexual conduct, etc., when it

> "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Ginsberg*, supra, at 200.

The Court emphasized that, in order to sustain the statute, it need conclude only that it was not irrational for the legislature to find that exposure to the condemned material is harmful to minors. It is significant, however, that the definition of "obscene material" employed in the statute did not extend the scope of "obscenity" beyond the Supreme Court's historically-sanctioned three-pronged definition. The Court did not consider the question of the obscenity of the material involved, but it intimated that it would more broadly construe the traditional definition of obscenity when applied to cases involving sales to minors. But the Court never suggested that material which has no relationship to a minor's prurient interest" can qualify as "obscene material."

Mr. Cotton alleges that his initial response to SPACE CITY! was provoked by a "letter to the editor" which appeared on the second page and which bore the caption "High Skool is Fucked."[16] Referring to this "letter," Mr. Cotton testified that he

> "realized then it should not be on the Waltrip campus, that if it were to come onto the Waltrip campus, it would create problems for us, create

> problems in the classrooms, create problems all over the school because it was the type of writing that is not acceptable in our community or in our schools."

In response to an inquiry about the specific manner in which the particular issue of SPACE CITY! violated School Board policy, Mr. Cotton replied,

> "because it had obscene words in it and these words are obscene in our area and on the school campus at Waltrip High School."

The court is persuaded that, on the basis of the Board's wording of its regulation, which specified "obscene language" rather than "obscene material," Mr. Cotton concluded in good faith that a written statement that "High Skool is Fucked" fell within the purview of the regulation. It is therefore evident that the possibility for abuse attending such a prohibition of "obscene language" is so great that such a wording of the regulation cannot pass the constitutional test. But even if "obscene language" had been comprehended within the court's injunction, Mr. Cotton nevertheless failed to apply to his judgment that SPACE CITY! is obscene two important limitations of the obscenity test.

In the first place, Mr. Cotton did not consider the issue of SPACE CITY! as a whole. He testified that he had not read the issue to any appreciable degree, and had not even scanned it beyond the second page. As long ago as 1934, a federal court held that a publication must be considered as a whole in order to determine whether it is obscene. Affirming a district

court decision not to interfere with the importation of James Joyce's *Ulysses* into the United States, Judge Augustus Hand found that

> "the book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust * * * The question in each case is whether a publication taken as a whole has a libidinous effect." *United States v. One Book Entitled "Ulysses"* by James Joyce, 72 F.2d 705, 707 (C.A. 2, 1934).

The Supreme Court adopted this test in its first major attempt to deal with the complex issue of obscenity, *Roth v. United States*, 354 U.S. 476 (1957).

A federal court in New Orleans recently rejected the argument that an allegedly obscene newspaper need not be judged as a whole, because it is merely a package of separate publications. The court cited the Supreme Court's decision in *Ginzburg v. United States*, 383 U.S. 469 (1966), to the effect that the obscenity of a magazine composed of several articles and illustrations depends on the effect produced by the publication as a whole, even though some of the items are obscene and some are not:

> "A publication is not obscene merely because it contains a blunt, Anglo Saxon word. The Old Testament contains passages of sexual candor, and four-letter words are not used for the first time in the literature of the seventies." *United States v. Head*, (E.D. La.) (Crim. No. 32036) (Sept. 1, 1970), at 7.

The court finds therefore that respondent Cotton erred in not considering the issue of SPACE CITY! as a whole before making a determination of its obscenity.[17]

Respondent Cotton also failed to apply correctly another part of the obscenity test, the definition of "common community standard" by which a work must be judged to determine its obscenity. Mr. Cotton stated clearly that he had evaluated the newspaper in terms of its probable reception in the area of Waltrip High School, and had concluded that its dissemination was "unacceptable" in that area.

The court's injunction was meant to apply to the entire Houston Independent School District. Separate standards for individual schools were not contemplated, nor can they be tolerated. The "community" whose "common standards" are at issue must necessarily be the whole community of the Houston Independent School District. The court finds, therefore, that respondent Cotton erred in disallowing distribution of SPACE CITY! on the basis of its unacceptability in the "Waltrip community."[18]

In sum, it is apparent that, even if the presence of "obscene language" in a publication qualified as an acceptable criterion for determining a student's right to distribute it, respondent Cotton failed to consider the constitutional limitations on the test for obscenity. But the court is also convinced that the particular "letter to the editor" which formed the basis of Mr. Cotton's decision to suspend movant is not in itself obscene, and further, that intermittent

employment of "fuck" and its ilk cannot, without more, render a publication obscene.

Dr. Stephen Tyler, professor of linguistics at Rice University, testified that the use of "fuck" in the declaration, "High Skool is Fucked," has no reference to sex and, in fact, denotes that high school is "in bad shape . . . in a pretty lousy state of affairs." Thus, the first requirement of the obscenity test, a prurient interest in sex, has not been satisfied.

Dr. Tyler asserted further that most students do not ascribe an obscene status to the word "fuck" as employed in the article in question. The word, he said, is simply becoming desemanticized, and this effect is especially evident among youth. A 15-year old female student, Cathy Cristoph, confirmed this view when questioned about the possible difference between the acceptability of such language by adults and its acceptability by students:

> "To young people it's more or less accepted. I mean, it's an every-day happening. And ordinary people, they just aren't used to it and they were raised up to believe that it was wrong."

The Supreme Court, on June 7, 1971, finally laid to rest the argument that the indiscriminate use of "fuck" is necessarily tantamount to obscenity. *Cohen v. California,* 39 U.S.L.W. 4713 (June 8, 1971). The Court, in a 5-4 decision whose opinion was delivered by Mr. Justice Harlan, reversed the breach of the peace conviction of an individual who had worn a jacket bearing the words "Fuck the Draft"

into a corridor of the Los Angeles Courthouse. The Court quickly dismissed the obscenity argument:

> "This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. * * * It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* at 4714.

Furthermore, respondents have forfeited their right to object to the appearance of "fuck" in SPACE CITY! by sanctioning the presence, in libraries of the Houston Independent School District, of various books and periodicals that contain similar vulgarisms.[19] A federal court in Michigan has previously examined the absurdity of such a double standard:

> "David Vought has been expelled from school for having possession of the Argus publication, on the ground that it contains certain four-letter words. The same four-letter words appear in 'The Catcher in the Rye' and the Harper's Magazine. Plaintiff's expulsion is not based on the general content of the Argus, or its literary quality or lack of literary quality, or its philosophic bent, or the type of publication it is, but is based solely on its containing certain four-letter words (or variations thereof)—the same words as appear in 'The Catcher in the Rye.' If we, as a trial court, are confused, what are we to suppose is the state of mind of a student subjected to such

a double standard? If the Argus is obscene within the meaning of the school principal's 'directive,' then surely 'The Catcher in the Rye' and the Harper's article must also be obscene. And if the student is invited and/or required to read the latter two, what can the school authorities have in mind in expelling him for possession of the former? "We are compelled to reject the position of the defendants in this case because it is preposterous on its face. It is contrary to any sense of fairness or consistency—a student, placed in the situation in which this school has placed this student, is required to make a judgment that we, as a court, would find difficult to make. * * *

"We decline to become involved here in a discussion on obscenity—that area of the law today is about as well-defined as the course of a tornado. We profess no expertise whatsoever in this field, but we do recognize rank inconsistency when we see it. And we see it here. And the inconsistency is so inherently unfair as to be arbitrary and unreasonable, constituting denial of due process, thus compelling us to conclude that the plaintiff's expulsion may not stand." *Vought v. Van Buren Public Schools,* 306 F. Supp. 1388, 1395-96 (E.D. Mich., 1969).

Mr. Cotton's only attempted justification for this double standard is the purported "educational merit" of the approved works. Mr. Cotton explained that the concept referred to

"whether or not books or periodicals would be approved by a group of people who would know what they were talking about so far as contents, description of characters. I am speaking in terms

> of English teachers, supervisors who know books and who know them well, and know what is best for the students in the Houston Independent School District."

Dr. Tyler, on the other hand, would apparently find that SPACE .CITY! possesses sufficient "education merit":

> At the risk of offending the Houston press, I would say that this is a better piece of journalism than, say, the 'Houston Chronicle,' which happens to be the paper I read at home * * * It has a wider variety of stories and in-depth coverage than you find in the usual metropolitan daily newspaper. It also goes into topics that are, if not taboo in the daily newspaper, relegated to something in the rear pages of the newspaper."

Although Mr. Cotton would probably accept on his campus any publication approved by "the powers that be", he suggests certain criteria that might render a book acceptable even though it contains a generous sample of "obscene language." Such language, when employed by *Harper's Atlantic Monthly*, and a number of books that appear in libraries of the Houston Independent School District, should be tolerated because it describes "things as they were at the time":

> "You will find quite a bit of this in a number of books where you have books about the war, about the poor people, the underprivileged. Many times this is the way they speak and this, to them, is not obscene. It's just a matter of their own conversation."

Mr. Cotton seems therefore to approve the use of vulgar language when it is employed to depict the

speech of a bygone era, but not when employed by a contemporary young person to describe his current dissatisfaction with the educational system. The court is unable to comprehend such a distinction and consequently, is constrained to find that respondents have failed to demonstrate a basis for discrimination between the use of vulgarity in SPACE CITY! and its use in school-approved publications. The court finds that, based on the standard of obscenity employed by the Houston Independent School District, neither the letter, "High Skool is Fucked," nor the entire issue of SPACE CITY! in which it appears, is obscene.

The court has of late observed a trend toward increasingly greater toleration of words that were once scrupulously avoided. Judge Wyzanski recently directed the school district of Lawrence, Massachusetts, to reinstate a teacher who had been dismissed because he wrote the word "fuck" on the blackboard to illustrate a class discussion of taboo words. *Mailloux v. Kiley*, 323 F.Supp. 1387 (D. Mass., 1971). The court found that

> "Boys and girls in the eleventh grade have a sophistication sufficient to treat the word from a serious educational viewpoint. While at first they may be surprised and self-conscious to have the word discussed, they are not likely to be embarrassed or offended." *Id.*, at 1389

Even more recently, the Supreme Court declared, in *Cohen v. California*, supra, that

> "The ability of government, consonant with the

> Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.*, at 4715.

Those who objected to the message of Cohen's jacket were not a captive audience. They

> "could effectively avoid further bombardment of their sensibilities simply by averting their eyes. * * * * Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.*, at 4715-16.

In a society in which the old and the traditional is daily being challenged by the new and the unprecedented, those who seek to guard against the encroachment of taboo words appear to be waging defensive warfare. The court believes that, far from signalling the moral crisis of our civilization, such a development is a healthy indicator of moral progress. In a witchhunt to expunge the momentarily embarrassing, we frequently tolerate language and name-calling that degrades the human spirit, and leaves its heritage of bitterness long after we have forgotten the reddened face and the temporary loss of composure that flash our instantaneous reaction to a string of four-letter words.

> "For Christians the truly obscene ought not to be slick-paper nudity, nor the vulgarities of dirty

old or young literati * * * *. What is obscene is that material, whether sexual or not, that has as its basic motivation and purpose the degradation, debasement and dehumanizing of persons. The dirtiest word in the English language is not 'fuck' or 'shit' in the mouth of a tragic shaman, but the word 'NIGGER' from the sneering lips of a Bull Connor." Statement of Howard Moody, January 25, 1965, quoted in *Christianity and Crisis*, March 22, 1971, at 45.

5.

Content of the Newspaper

The School Board regulation, in conformity with the injunction's mandate that a student-distributed publication may not be prohibited, except for obscenity and libel, on account of its content, dutifully recites that

> "Distribution shall not be prohibited because the publication contains the expression of any idea, popular or unpopular."

The court has reluctantly concluded, however, that Mr. Cotton determined to prevent distribution of a particular issue of SPACE CITY! because he disapproved its social philosophy, its political position, and its unorthodox style.

In his testimony, Mr. Cotton, although he generally took care to fashion his objections to the publication in terms of obscenity, occasionally revealed the more probable basis for his decision to prevent distribution. Responding to an inquiry about the possible distinction between the use of the word

"fuck" in SPACE CITY! and its use in school-approved publications, Mr. Cotton replied,

> "Now, I am not saying that these words are not, would not be used in some of the English books. I will cover that later. I am saying that in this particular article where you have a conglomeration of words, nothing but spite and disrespect for the school."

Movant's counsel immediately seized upon this revelation about "spite and disrespect" and attempted to provoke Mr. Cotton into amplifying. But the principal quickly returned to his standard characterization of the article as obscene.

Later in his testimony, Mr. Cotton discussed his reaction upon being informed that a student was selling SPACE CITY! at the entrance to Waltrip:

> "And I went immediately to the entrance because I was familiar with the SPACE CITY! newspaper and I did not want the SPACE CITY! news on the campus."

The court then asked Mr. Cotton if, prior to his confrontation with movant, he had formed an opinion about SPACE CITY!:

> "Yes, sir. This is correct. Not this particular issue, but I knew what had been in some of the other papers, obscene language, and it had no merit as far as the contents were concerned."

When such admissions are considered in conjunction with the presence in the Waltrip library of

periodicals containing the same "obscene language" that Mr. Cotton found unacceptable in SPACE CITY!, the conclusion is inescapable that Mr. Cotton proscribed SPACE CITY! primarily because, on the basis of previous issues and on the basis of the letter "High Skool is Fucked," he believed that it evidenced a brazenly insulting attitude toward values cherished by Mr. Cotton and the vast majority of Americans.[20] Preeminent among these is the authority which school officials possess over the lives of students. In Mr. Cotton's view, distribution of SPACE CITY! at Waltrip would undermine his authority to a completely intolerable degree. But it was not lust for personal power that motivated his response. The public school is, to Mr. Cotton, and to countless millions of his fellow citizens, one of the bulwarks of this nation. To attack the public school is to sabotage America.

The court does not quarrel with these beliefs, and, in fact, shares the concern of respondents and others about the breakdown of discipline in the public schools. Free expression, nevertheless, cannot prevail unless courts are vigilant to impose limitations on institutions that, whether knowingly or unwittingly, seek to stifle free expression. A previous injunction has defined these limitations. In the case at bar, the court affirms their validity.

6.

Disruption

Much attention has been devoted in recent years to "disruption" as a criterion for determining the

limits of the legitimate exercise of student right. The court's injunction permitted regulation of student distribution to the limited extent necessary

> "to prevent substantial and material interference with or delay of normal classroom activity or normal school function."

The Board's regulation ignores this difficult problem. Apparently, the Board assumed that any distribution not conforming to imposed restrictions should be deemed "disruptive." But in presenting their evidence to the court, respondents attempted to demonstrate that movant's distribution of SPACE CITY! had indeed resulted in significant disruption.

The only evidence of disruption offered by respondents is the testimony of Mrs. Carrie Tomlinson, a geometry teacher at Waltrip. Mrs. Tomlinson stated that one of her students brought into her class a copy of SPACE CITY!, apparently purchased from movant, and began reading it in full view of teacher and fellow students. Mrs. Tomlinson testified that she considered the episode disruptive; indeed, she confiscated the newspaper from the offending student. But Mrs. Tomlinson also left the clear impression that the particular contents of this issue of SPACE CITY! was not the culprit.

At the hearing before the School Board, she agreed that the student was "making a spectacle of himself" in reading the newspaper, and later, that the "disruption" resulted primarily from

> "the manner in which he was displaying the pa-

> per and the fact that he was reading it when we were supposed to be spending our time working * * *."

And to Reverend Everett's query as to whether the reading of *any* newspaper in class would be disruptive, Mrs. Tomlinson replied that

> "it would be if it distracted the attention of the other students."

This brief incident, quickly resolved by an experienced teacher, represents the sole evidence of disruption traceable to movant's distribution of SPACE CITY! Mrs. Tomlinson was able immediately to put an end to the "disturbance," without significant effort or loss of time, merely by correcting the offending student. In short, the disruption resulting from such distribution was negligible. Respondents have completely failed to demonstrate that "substantial and material interference with normal classroom or school activity" that is contemplated by the court's injunction.

In anticipation, however, of some future disruption, the court feels obliged to clarify the extent to which "disruption" should result in the discipline of a student distributor. In the opinion accompanying its previous injunction, this court declared that

> "It is also clear that if a student complies with reasonable rules as to times and places for distribution within the school, and does so in an orderly, non-disruptive manner, then he should not suffer if other students who are lacking in

self-control, tend to over-react thereby becoming a disruptive influence." *Sullivan*, supra, at 1340.

Such sentiments did not originate with this court. The Supreme Court made it clear in *Tinker* that it did not view with favor the discipline of students who do not themselves provoke disturbance:

> "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance *on the part of petitioners*. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Tinker*, supra, at 508.

In *Cohen v. California*, supra, the Court again rejected the view that the protesting individual must be silenced in order to protect society from possible outbursts by violence-prone opponents:

> "We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition

that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." *Id.*, at 4715.

The Court of Appeals for the Seventh Circuit has delineated a constitutionally tolerable method for dealing with disorder:

> "* * * the Supreme Court has indicated that the principles announced in *Terminiello* are not without application when the free speech of students is threatened. * * * * We think a similar principle operates to protect long-haired students unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct * * * *. The record is silent, however, concerning actions taken by the school officials to punish those students who actually caused the relatively insubstantial disruption which occurred in this case. Therefore, we hold that defendants have failed to satisfy their substantial burden of justification under their first theory." *Crews v. Cloncs*, 432 F.2d 1259, 1265-66 (C.A. 7, 1970).

In the event that school officials have tried and failed to control the disruptive students, they may justify "emergency action" against the long-haired student only upon a showing of "exceptional circumstances." *Crews*, supra, at 1266, fn. 8.

This court adheres to such a view. In order to sustain suspension of a student distributor, respondents must demonstrate (1) substantial and material interfer-

ence, and (2) a good faith, but unsuccessful attempt to discipline the disrupting student or students. Furthermore, respondents should not be permitted to enact blanket prohibitions merely upon an "undifferentiated fear or apprehension of disturbance." *Tinker*, supra, at 508. The Supreme Court has expressed this thought most eloquently:

> "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk * * *" *Tinker*, supra, at 508.

7.

The Special Emergency Situation

The court recognizes that exceptions necessarily delimit every rule. In the emotionally charged area of public school policy, a greater-than-usual degree of flexibility is perhaps essential. The testimony of respondents' witness Mr. Lawrence Marshall, area superintendent for zone six of the Houston Independent School District, confirms what is obvious to courts and educators alike: that, in time of crisis, where lives and property are seriously threatened, customary constitutional protections may be temporarily curtailed in order to prevent the destruction of the system which confers those rights. At the same time, the striking contrast between the emergency situation depicted by Mr. Marshall, and the almost

routine incident of the case at bar, provides further evidence that the first amendment is the rule, whose abrogation the state must subsequently demonstrate was clearly justified by the peril of the moment.

Mr. Marshall related an incident that occurred earlier in the school year at Sam Houston High School. An explosive situation had developed out of the hostility between black and white students, inflamed by what Mr. Marshall believes are "outside forces . . . bent upon disrupting the community and the educational process," in order to prevent the successful implementation of the court-ordered desegregation of the school. Fights were continually breaking out and then, a stabbing took place. Mr. Marshall decided to send home a large number of students in order to allow time for passions to cool. Although such action may be classified as a technical breach of this court's previous injunction, the court is convinced that the situation described had clearly reached a stage at which emergency measures were justified under the "clear and present danger" theory. Furthermore, the subsequent conduct of Mr. Marshall was so exemplary that the court commends him for the high degree of concern for students which his actions demonstrate.

In the first place, all suspended students were permitted to return to campus the following week, with or without their parents. Following the students' return, Mr. Marshall separately convened each of the three classes to attempt to reach a solution. Finally, Mr. Marshall testified that, in his view, suspension should be utilized only as a last resort. The school,

he believes, is obligated first to make every effort to rehabilitate a student's behavior.

Mr. Marshall acted calmly and intelligently to choke off an extremely dangerous buildup of student passion. He chose the only reasonable course open to him at the moment, and the court has no doubt that, throughout the ordeal, his primary concern was the safety of his students. It is ludicrous to attempt comparison between the crises at Sam Houston and the effects of movant's distribution of SPACE CITY! at Waltrip. To recognize the first amendment rights of students is not to tie the hands of administrators in truly perilous situations. Judicious men will be readily able to draw the distinction. And courts will remain available to assist the less discriminating.

IV

How Paul Kitchen Was Suspended

1.

The Power to Suspend

Another major focus of movant's attack relates to the procedures employed by respondents to effect his suspension. The court's injunction set forth the minimum requirements with which respondents must comply in order to guarantee a student his right to due process under the fourteenth amendment to the United States Constitution. For suspensions of more than three days, and for all suspensions not specifically limited to three days or less at the time of

imposition, the injunction required (1) written or personal notice, both to the student and to at least one of his parents; (2) an offer of a formal hearing at which evidence might be presented by both sides; and (3) a decision based on a "dispassionate and fair consideration of substantial evidence that the covered student committed the acts for which discipline is imposed and that such acts are in fact a proper reason for such discipline."

The School Board incorporated all these provisions, and several others,[21] within its new regulations. The original "hearing," however, is to be conducted by the principal. For reasons that are fully explained below, the court considers this aspect of respondents' procedures to be inconsistent with due process and with the court's injunction. Furthermore, the regulations were themselves violated in the particular case at bar. First, however, the court will briefly consider the school's power to suspend.

It is probably a futile undertaking to attempt to measure the value of a high school diploma in American socitey in A.D. 1971, a society of paper credentials. In most cases, it is a sine qua non of economic prosperity, if not economic survival. It confers social benefits that endure for a lifetime, and it undoubtedly contributes significantly to the psychic health of an individual. Education, in short, is a priceless commodity.

Furthermore, it is a fundamental right of every citizen. Just as the Supreme Court has declared that United States citizenship cannot be revoked except

by voluntary expatriation, *Trop v. Dulles*, 356 U.S. 86 (1958), so courts should declare that an individual's guarantee of an education, only quantitatively less basic than the right of citizenship, cannot be annulled, even temporarily, except in the most extreme circumstances.

In addition, suspension is a particularly humiliating punishment, evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of classical Athens. Suspension is an officially-sanctioned judgment that a student be for some period removed beyond the pale. Should he venture onto the campus while under suspension, school officials threaten him with police intervention.

> "* * * it must not be forgotten, however small the community, however familiar to one another the characters in the drama, that when a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden, or the militia." *Breen v. Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc., 1969), aff'd 419 F.2d 1034 (7th Cir. 1969).

The outcast student may learn a lesson from his suspension, and return to school a remorseful and more docile individual. On the other hand, the student may choose not to return at all. Without encouragement from school or family to continue his education, he may view himself as a failure, and his fate as deserved.

Dr. William Glasser has written, in *Schools Without Failure,* (New York: Harper & Row, 1969) that a large portion of our education system is failure-oriented:[22]

> "* * * there are factors within the education system itself that not only cause many school problems but that accentuate the problems a child may bring to school." Glasser, supra, at 8.

Just as the major responsibility for such failures rests with the school as an agent of the larger society, so it is upon society that the results of such a short-sighted policy will be visited:

> "Unless we can provide schools where children, through a reasonable use of their capacities, can succeed, we will do little to solve the major problems of our country." Glasser, supra, at 6.

The suspended student is frequently the child of parents who attach little importance to education, or who are simply unconcerned about their child's welfare. In such instances, the emphasis of the School Board's regulations on the parental role in effecting the return of a suspended student, and most particularly, the failure of those regulations to require the school to take the initiative in insuring his return, constitutes a reckless abdication of responsibility.[23] Such omissions permit the principal to attach onerous conditions to the student's re-entry. In the case at bar, respondent Cotton refused to allow movant to return to school until one of his parents attended a meeting with the principal.

Even if the parents of the suspended student are dedicated to his best interests, it often happens that because of conflicting obligations, the parents are unable to meet with the principal for a substantial length of time, during which the student remains suspended. Such is the situation in the case at bar.

Movant was suspended on Tuesday, October 20. His father, Anthony P. Kitchen, was unable, however, to attend the required meeting with Mr. Cotton until the following Monday. Mr. Kitchen's supervisor, Mr. Harold Kelly, chief test board man for Southwestern Bell, testified that, during the entire week of October 19, Mr. Kitchen was engaged in a very unusual activity, which consisted of relocating microwave terminals while keeping all toll facilities in operation. Mr. Kitchen was the only employee under Mr. Kelly's supervision who was qualified to perform this task, and leave had been scheduled well in advance. Because Mr. Cotton declined to meet with Mr. Kitchen during other than school hours, movant was obliged to remain in limbo for six days. The meeting was scheduled for Monday, October 26, but never took place, because Mr. Cotton had by then requested the police to remove movant from campus, and Mr. Kitchen thereupon decided to consult an attorney.

Courts cannot compel parents to concern themselves with their child's education to the exclusion of every competing obligation. The possibilities for conflict are numerous: illness, death, employment, other children. And it would be futile for courts to attempt to educate unconcerned parents about their responsi-

bilities toward their children. The only plausible course is to persuade the school to abandon the view that suspension represents the termination of the school's responsibility. Rather than enabling school officials to rid themselves of undesirables and undesireds, suspension should be considered as merely a preliminary phase of a long and difficult struggle to salvage the rejected student—and not merely to reclaim his physical presence, but to invigorate his intellectual curiosity and above all, to replenish his self-esteem.[24]

Mr. Marshall expressed in his testimony the view that the burden ought to be on the school to follow up on a suspended student, to attempt to ascertain whether the source of the disciplinary problem might be discovered in the home. Mr. Marshall believes that a suspended student remains the responsibility of the school. The court wholeheartedly agrees.

Mr. Marshall further testified that, in his opinion, suspension should be employed only as a last resort. It is the role of the principal, he feels, to endeavor to rehabilitate the behavior of recalcitrants. Mr. Marshall is presently attempting to mobilize all available school personnel in his area for this task of rehabilitation.

> "We are moving toward an open school concept, not only in terms of classrooms, but in terms of the community where you can have community involvement. We now have counselors working around the clock to strive to establish contact with parents in order to help these youngsters."

Although Mr. Marshall feels very strongly that suspension ought to be maintained for dealing with extreme situations, both his rhetoric and his performance indicate that a decision to suspend is for him no casual determination. The three-day suspension remains intact, and should provide a challenged principal with sufficient leverage to discipline the incorrigible when all other means fail. And in times of emergency, the principal may of course temporarily subordinate student rights to student safety.

2.

Who Can Suspend

The court's injunction requires school officials to predicate any decision to suspend a student "upon a dispassionate and fair consideration of substantial evidence." The School Board's revised regulations continue, however, the policy of permitting the principal to conduct the original hearing and to render the initial ruling, even in cases where the basis of the suspension is a confrontation between the principal and the ousted student.

The regulations describe an appellate process through an assistant superintendent, a deputy superintendent, the Superintendent for Instruction and Administration, and ultimately, to the Board of Trustees. But the tendency of virtually every administrative appellate body to affirm the decisions rendered at a lower level means that it is particularly vital that the initial hearing offered a suspended student be a meaningful one. The court is persuaded that it is unrealistic to expect that such a hearing can be

meaningful when prosecutor and judge are united in the same individual.

The Court of Appeals for the Fifth Circuit, in *Williams v. Dade County School Board*, (No. 30249) (April 5, 1971), recently held that a meeting between a principal, a suspended student, and the student's parents, in which the principal merely explained to the parents the decision he had already reached, did not qualify as a "hearing," even though denominated as such by the principal.[25] The court did not deal with the question of whether the principal should be permitted to conduct a hearing for the student whom the principal has himself decided to suspend. This court believes, however, that it is practically inevitable that a principal, who as prosecutor has adjudged a student in need of suspension, will, as judge, affirm his own prior ruling.

Recently, the Supreme Court has offered some support for this view. In *Mayberry v. Pennsylvania*, 27 L.Ed.2d 532 (1971), the Court held that a criminal defendant who repeatedly insulted and vilified the trial judge while disrupting courtroom proceedings was entitled, under the due process clause, to a public trial before another judge on contempt charges. The Court recognized the inherent difficulty facing the judge whose judicial impartiality is compelled by due process, but whose personal animosity is dictated by human nature:

> "Yet a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detach-

> ment necessary for fair adjudication. *In re Murchison*, 349 U.S. 133 * * * was a case where a judge acted under state law as a one-man grand jury and later tried witnesses for contempt who refused to answer questions propounded by the 'judge grand jury.' We held that since the judge who sat as a one-man grand jury was part of the accusatory process he 'cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.' *Id.*, at 137 * * * 'Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.'" *Id. Mayberry*, supra, at 540.

This court will not prescribe for respondents any particular procedure to enable them to provide the kind of "meaningful" hearing mandated by the previous injunction and by principles of due process. The court merely *proscribes* the procedure whereby any single individual can both determine to suspend a student and subsequently, function as the court of original jurisdiction to judge the propriety of that suspension.[26]

3.

Movant's Suspension

In the case at bar, movant was suspended until Mr. Cotton met with one of his parents. Although respondents have insisted that a hearing could have been held within the hour if movant's parents had been available, the court has already made clear that the rights of a suspended student cannot be made to depend upon the attitude, or the schedule, of his parents.

Mr. Cotton admits that he set no definite limit on movant's original suspension. The suspension must therefore be characterized as one "which is not specifically limited to three days or less at the time of imposition." Accordingly, Mr. Cotton was required by the terms of the court's injunction, before effecting movant's suspension, to provide him with due process as defined in the injunction.

V

Available Remedies

Were the court to compel precise conformity to the terms of its injunction, as is vigorously suggested by movant, it would be necessary to hold Mr. Cotton in contempt of court. Even the School Board, by virtue of the failure of its revised regulations to carry out the court's full mandate, must then be adjudged in contempt. The court is convinced, however, that neither the Board nor respondent Cotton has acted in bad faith in interpreting the previous injunction, and that both made a sincere effort to decipher a series of instructions which, at best, omitted vital details, and, at worst, were poorly phrased and even contradictory. That injunction will be clarified in the hope that such confusion will not again arise.

The court will, for the same reason, decline to award movant compensatory damages.[27] Because, however, the justifications announced for the decision to suspend movant, as well as the procedures employed to effect the suspension, are contrary to the previous mandate of this court, movant must be allowed credit for the school work which he missed

during the period of his suspension and which he subsequently made up pursuant to the court's temporary restraining order.

At this point, the court must impose a caveat. Students should not be permitted to ignore, as movant did, legally enacted regulations of the school district. Even if such regulations impinge in the most flagrant manner upon the constitutional rights of a student, his remedy is to challenge the rules through lawful means.

The School Board ought to establish a grievance procedure to secure justice for those students who love the law as well as the Constitution.[28] But even if a student is compelled to make his challenge by informal means, this court cannot sanction a student's defiance of every regulation he believes to be a constitutional infraction. Students who subsequently invoke the equitable powers of this court are forewarned that they must come with clean hands. To require less is to invite anarchy.

Movant is granted ten days from the date of this order in which to submit to the court a final judgment securing all relief granted individually to him in accordance with this opinion. In addition, both movant and respondents are granted 30 days from the date of this order in which they may submit to the court a proposed supplementary injunction clarifying the court's previous injunction in accordance with this opinion. Following such submission, each party is granted an additional 15 days in which to submit to the court its objections to the supplementary in-

junctive relief proposed by the opposing party. The court will then, on the basis of these submissions, issue an injunction supplementing and clarifying its order of December 30, 1969.

Clerk will file this Memorandum Opinion and Order and provide counsel for all parties with true copies.

Dated at Houston, Texas, this 23rd day of June, 1971.

WOODROW SEALS
United States District Judge

FOOTNOTES

1. The regulation stated as follows:

The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command.

2. The working committee was composed of some of the most outstanding residents of the Houston area: two attorneys, W. Amon Burton, Jr., and John Barnhart; Mrs. Morris Mills, president of the Parents' League of Houston; Mrs. Jeff Montgomery, Harris County Drug Abuse Program; Mrs. Charles Rives, president of the City Council Parent-Teachers' Association; Rev. Hunter Morriss, executive director of Houston Metropolitan Ministries; and two students, Miss Arlene Rachal, Wheatley High School, and Larry Davidhizer, Lamar High School. Attorney Marc Grossberg served the committee as special counsel.

The court takes notice that the School Board received first place in the National School Board award program while this case was under submission. This citation demonstrates the exceptional ability of the Superintendent of Schools, Dr. George Garver, and the excellent achievements of the School Board under the leadership of its chairman, Dr. George Oser.

3. The complete text of the new Regulation on Student Publications is as follows:

Student participation in the publication of school newspapers, yearbooks, literary magazines, and similar publications is encouraged by the Houston Independent School District as learning and educational experiences. These publications have qualified faculty advisors and strive to meet high standards of journalism. Opportunities for a broad spectrum of opinions shall be provided.

In addition to school-sponsored publications, students are entitled to express in writing their opinions and may distribute handwritten, duplicated, or printed materials on school premises or at school-sponsored activities at other locations in accordance with the following conditions and procedures:

1. A copy of the publication must be given to the principal, who may take up to one school working day for the purpose of reviewing such publication before its general distribution. If, in the opinion of the principal and the attorneys employed by the Houston Independent School District, the publication contains libelous or obscene language or advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Education, the principal shall notify the individual or sponsors of the publication that it cannot be distributed on the school premises. Distribution shall not be prohibited because the publication contains the expression of any idea, popular or unpopular.

2. A time and place for distribution must be cooperatively established with the principal, except that in any event the distribution can take place before and after regular school hours on school premises.

3. The publication cannot be sold on school premises.

4. The publication must contain the names of the individual contributors, editors and publishers.

Distribution on school premises of material consisting primarily of commercial advertising or literature advocating the nomination or election of any person for public office is expressly prohibited.

Distribution of printed material off school premises will be subject to the foregoing rules when the manner of distribution is calculated to and in fact does result in possession by students on school premises. This includes distribution at places adjacent to the school premises in the morning before normal classroom activity has begun.

4. Although respondents have repeatedly emphasized movant's use of profanity in the presence of the principal and others, it is clear that Mr. Cotton had already determined, at the time movant first used profanity in his presence, to suspend movant for an indefinite period, i.e., until one of his parents met with the principal.

5. The letter of suspension reads as follows:

Dear Mr. Kitchen:

Paul has been suspended from school for violation of School Board policy regarding school publications and using profanity in the presence of my secretary, Mrs. Winship, and my clerk, Mrs. Lynn, and me. A copy of the rules regarding student publications is posted in each room and on the main bulletin boards around the building. I regret that I have to suspend Paul, and I want to notify you of the proper procedure.

At your request I will be glad to have a meeting in my office, and you may have witnesses and present evidence at the hearing to refute the allegations of misconduct. Following is a quote from Board policy:

> "A student or his parent or guardian who desires to be assisted at the hearing of any disciplinary proceeding may be accompanied by an adult person who may represent and assist him in the proceedings. If a parent or guardian is unable to attend, he may designate an adult to represent the student. The Houston Independent School District may require evidence of the appointment of any such representative."

I will be glad to talk with you any time during school hours. Enclosed is a copy of regulations which are posted in this school. I call your attention especially to the paragraph marked in red.

Sincerely yours,

/s/ Gordon M. Cotton

6. The date on which Paul re-entered school pursuant to the court's temporary restraining order of November 24, 1970.

7. On December 23, 1970, the court, following a prolonged controversy, ordered respondents to allow Paul to make up the work he had missed during the period of his suspension, but reserved the question of credit for this work pending a decision on the merits of the case.

8. See this court's recent decision in *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Tex., 1970).

9. George Dennison is perhaps the most articulate representative of a relatively new group of critics of education, who largely dispense with theory and instead write about their experiences in the classroom, usually with ghetto or underprivileged children. Their ranks include John Holt (*How Children Fail, How Children Learn, The Underachieving School*); Herbert Kohl (*36 Children, The Open Classroom*); Jonathan Kozol (*Death at an Early Age*); and James Herndon (*The Way It Spozed To Be, How to Survive in Your Native Land*). Another highly informative work, *Pygmalion in the Classroom*, by Harvard psychologist Dr. Robert Rosenthal and South San Francisco principal Dr. Lenore Jacobson, demonstrates the operation of the principle of the self-fulfilling prophecy—the idea that expecting a result can cause that result. As applied to the classroom, the principle means that a teacher's expectations contribute significantly to his pupil's achievements.

10. Since January 1, 1971, courts have ruled favorably to student complainants in *Martin v. Davison*, 322 F. Supp. 318 (W.D. Pa., 1971); *Lambert v. Marushi*, 322 F. Supp. 326 (S.D. W.Va., 1971); *Axtell v. LaPenna*, 325 F. Supp. 1077 (W.D. Pa., 1971); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass., 1971); and *Watson v. Thompson*, 321 F. Supp. 394 (E.D. Tex., 1971). The last of these decisions, by Judge Justice of the Eastern District of Texas, is perhaps the most lucid opinion yet to appear in the area of student rights. *Dawson v. Hillsborough County, Florida School Board*, 322 F. Supp. 286 (M.D. Fla., 1971), another thorough and thoughtful ruling in the student's favor, has been affirmed by the Court of Appeals for the Fifth Circuit within the past few days.

11. In the context of the public school, the *Tinker* decision defined "clear and present danger" as that which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Community School District*, 393 U.S. 503, 513 (1969).

12. The revised regulation states: "Distribution of printed material will be subject to the foregoing rules when the manner of distribution is calculated to and in fact does result in possession by students on school premises. This includes distribution at places adjacent to the school premises in the morning before normal classroom activity has begun."

The court considers as reasonable this aspect of the regulation, especially in view of the court's emphasis on disruption as a proper criterion, infra.

13. Because the most important aspect of a newspaper is its timeliness, even a 24-hour period may be too great. SPACE CITY!, at the time of these events, was published bi-weekly. The court takes judicial notice that it now appears weekly. In the case of a daily, a 24-hour delay would completely destroy the newspaper's effectiveness. The point is that the regulation makes no distinctions based on frequency of publication.

14. The New York City and Philadelphia school systems do not permit prior restraint. The New York City rule is that "none of the literature . . . need be approved in advance by school officials." The Philadelphia regulation states that "there shall be no prior censorship or requirement of approval of the contents or wording of such material . . ."

15. The substitution of "k" for "c" and "ch" (e.g., "Amerika") is widely current among publications of the New Left, and is believed to derive from the writings of Franz Kafka.

16. The letter, captioned "High Skool is Fucked," reads as follows:

Dear Brothers and Sisters,

What ever happened to the skools where you learned? Now you compete for grades, memorize and spit it back out on test day. It is as boring as hell, you don't talk to your friends in class or you get your ass bit. You grow your hair long because you love it and it's beautiful, then you get thrown out for being a radical and not wanting to conform to the fucked rules and regulations of the so-called "great society." Big shit! Think about your brothers the chicanos and blacks getting fucked all the time, only because they weren't born white. You write up a leaflet, pamphlet or newspaper to get your friends to get it together, and see how they are getting fucked, and you get thrown out.

The courses skools have are the same ones they have had for fifty years. They don't try to teach, they just want you to pass and get the fuck out of there. It's their jobs—they are getting paid not us. You try to get the attention of the administration and skool board by boycotts or demonstrations and you get thrown out or busted.

Like some might be trying to learn but you can't because you're busy getting hassled for the length of your hair. Big shit! Hair length or the clothes you wear don't have a fucking thing to do with learning. If you could be in a relaxed atmosphere you might could learn something. But not at skool, they're too busy telling you to "sit up straight," "don't chew gum," "you can't smoke in skool," "don't come back til you cut your hair and wear decent clothes," "don't talk or we'll bust your ass." Man it is a big fucking burn you just can't learn under those conditions.

You have read and heard the same thing before, but we have to quit fucking around and do something. Right now! I don't mean petitions and talks with the administration because they have been tried and failed. Now is the time to go to actions and not talking. Do it!

Venceremos!
Gerald (Bushman) Smith
MacArthur High
Houston

P.S. Space City is the most out-a-sight paper keep putting it out. We just love you. MacArthur Sr. High is fucked.

17. Mr. Cotton in fact correctly applies the test to publications which he believes possess "educational merit." With regard to numerous periodicals and books displayed in the Waltrip and other libraries of the Houston Independent School District, and containing numerous examples of vulgar language, Mr. Cotton states repeatedly that, although the words themselves are "obscene," their usage in such publications does not render obscene the total work because such publications have "educational merit" and are "approved by the powers that be."

18. Judge Singleton of this District has expressed doubt, with which this court is in full agreement, that *any* community standard should be allowed to shackle individual freedom:

"Certainly, the democratization of American life has not come to the point where every whim of the majority may be enacted into a mandate for all to follow. If so, then the Bill of Rights is for naught." *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857, 861 (fn. 4) (S.D. Tex., 1969).

But the "common community standard" test apparently still commands the approval of a majority of the Supreme Court.

19. The following books and periodicals, all of which contain words which Mr. Cotton describes as "obscene language," appear, or have appeared, in the following school libraries, among others, of the Houston Independent School District: *Atlantic Monthly* (Wheatley, Lamar, Bellaire, Westbury, Kashmere, Waltrip); *Harper's Magazine* (Wheatley, Lamar, Bellaire, Westbury, Kashmere, Waltrip); *A Separate Peace*, by John Knowles (Wheatley, Lamar, Bellaire, Westbury, Kashmere, Waltrip); *The Catcher in the Rye*, by J. D. Salinger (Wheatley, Bellaire, Kashmere); *The Confessions of Nat Turner*, by William Styron (Bellaire, Westbury, Kashmere); *Love Story*, by Erich Segal (Bellaire, Kashmere); *Nigger*, by Dick Gregory (Wheatley, Kashmere).

20. Proscription of particular words seemed to the Supreme Court in *Cohen v. California*, 39 U.S.L.W. 4713 (June 8, 1971), to involve "a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.*, at 4716.

21. See footnote 4, supra.

22. It seems to this writer that a child who fails often first seeks attention and frequently, this effect is manifested in some dramatic or unusual conduct. In this case, it appears that the real reason movant decided to confront the enormous power vested in the high school principal was his failure to make the school basketball team.

Movant also appeared to be an underachiever in his academic work. His spring, 1970, grade averages were C, D, D, F, F. His spring, 1971, grades, however, showed a marked improvement: C, B, B, B. Furthermore, it is interesting to note that movant's conduct grade has been, with one exception, "E" (excellent) throughout high school.

23. It might be that the American public school system wants only the all-American child—the child who is not emotionally disturbed nor troubled by behavior problems; one who comes to school neat, clean and well-dressed and with all the extra (and sometimes expensive, to him) paraphernalia; one who is passive and non-aggressive and will sit all day with his hands folded neatly in front of him.

It might be that this type of school system is partly responsible for the increase in crime and delinquency. A school system that causes a large number of students to fail in their academic work, in their

style of life culture, in athletics and in social acceptance, will cause these failures to be pushed into the streets with other failures, from whence it is often only a short step to a juvenile court.

The distinguished judge of the Harris County Juvenile Court, Judge Wallace H. Miller, recently expressed the opinion that school authorities contribute to juvenile delinquency by "summarily kicking a kid out" of school when a criminal charge is lodged against him. Speaking before a panel named by the Houston School Board to define the school district's role in dealing with juvenile delinquency, vandalism and crime, Judge Miller said that, although it is understandable for school officials to dismiss students who have broken school policies, he "can almost guarantee we'll have a delinquency case when we might not have had one." *Houston Chronicle*, March 23, 1971, at 9.

24. One solution might be to send a suspended student to a central location under the supervision of the school district until his parent or guardian is notified, rather than turning the child out on the street without a follow-up. But this kind of approach, as well as punishment by retention after school or extra assignments, may not be popular with teachers and administrators because it requires of them a larger expenditure of time and effort.

25. In *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285 (S.D. Fla., 1970), a three-judge court in this Circuit upheld a suspension imposed, without a hearing, for a ten day period. The court in *Williams* distinguished between the 30 days imposed therein, and the ten days imposed in *Banks*, and held that a hearing was required in the former case. The three-judge court did not, however, establish a rule of ten days as the definitive line of demarcation in determining what is "substantial discipline." This court's injunction established that line at three days, and the court remains convinced that three days is the most appropriate figure.

26. In the New York City schools, the principal may suspend for a period of up to five days. Even for short-term suspensions, detailed regulations apply to safeguard the constitutional rights of the disciplined student. In the Houston Independent School District, by contrast, short-term suspensions, defined by this court as suspensions for a period of three days or less, are totally committed to the discretion of the principal and subject to no written regulations whatsoever.

In the Philadelphia schools, the following rules apply to suspensions in excess of five days:

1. A member of the Board, sitting as a committee of one, together, with appropriated staff, shall hear all cases involving suspensions in excess of five school days and expulsions from the school system. This member shall conduct an informal hearing and make a recommendation to the Board.
2. The hearing shall be held promptly.

3. Proper notice of the hearing shall be served on the parent or guardian of the student at least five days before the date of the hearing. In addition to giving the time and place of the hearing, the notice shall briefly set forth the alleged act or acts of which the student is charged.

4. The notice should also advise the student and his parent or guardian of their right to present witnesses and be represented at the hearing by legal counsel. In cases where the student has legal representation, a member of the legal staff of the School District shall represent the school administration.

5. The hearing shall be tape-recorded, from which a summary of the testimony of each witness shall be made on request. Tapes shall be preserved in accordance with practice of the Board.

6. No one except counsel, the parties and their witnesses shall be permitted to be present at the hearing.

7. The witnesses shall give their testimony under oath, and the right of cross examination shall be permitted. The admission of evidence shall be a matter within the discretion of the Board member.

8. The failure of a student and/or his parent or guardian to attend the hearing, after proper notice, shall constitute a waiver of the right to a hearing.

9. The findings of fact and the recommendation of the Board member to the Board shall be in writing. This recommendation shall be acted upon at the next regular meeting of the Board. and the student and his parent or guardian shall be advised, immediately thereafter, of the Board's decision. The Board shall protect the student's and his parent's or guardian's right to privacy.

10. If the Board expels the student he shall be referred to the school counselor for referral to an appropriate agency for further counseling and guidance, or for assistance in obtaining employment, or continuing his education * * *"

27. In *Pyle v. Blews* (No. 70-1829) (S.D. Fla.) (March 29, 1971), a federal district judge in Florida awarded the student plaintiff $100.00 in compensatory damages and $182.00 in court costs.

28. The Philadelphia school system has adopted the following regulations to deal with student grievances:

Section 1—Definitions

A grievance is a complaint by a student in the School District of Philadelphia that there has been to him a personal loss, injury, or a violation, misinterpretation or inequitable application of an established policy governing students.

It is a basic policy of the student grievance procedure to encourage students to discuss their grievance informally with the person against whom the grievance is directed, prior to the grievance procedure. The student may seek advice or services of the ombudsman in attempting to solve the grievance informally. If the student so desires, the ombudsman shall accompany the student in going to the staff member at this informal stage.

It is expected that the great majority of cases will be resolved in this fashion.

Where the technique is proved to be inadequate or the student is unable to do this, he may invoke the grievance procedure.

Section 2—Procedure for Adjustment of Grievances

1. The grievance shall be submitted in writing to the principal. However, if the grievance involves the principal directly or is directed against a policy that the principal has decided upon, the student may decide to skip step 1 and proceed immediately to the District level.

   Within 5 school days, the principal shall call a meeting of the student, who may be accompanied by ombudsman or parent, the staff member and the PFT representative, if the staff member so chooses, to discuss the grievance. The principal shall make every effort to resolve the matter equitably and as quickly as possible, but within a period not to exceed 3 days. The principal shall communicate his decision in writing to the student, parent, and the staff member.

   Failure on the part of the principal either to call a meeting or to render a decision in writing within the designated time, shall constitute the basis for an automatic appeal to the next level.

2. If the grievance is not resolved to the satisfaction of the student, he may appeal the principal's decision to the district superintendent in writing within 3 school days.

   The district superintendent or his designee shall meet with the student who may be accompanied by the parent or ombudsman, the staff member and his representative, in order to resolve the matter equitably and as quickly as possible, but within a period not to exceed 5 school days. The district superintendent shall communicate his decision in writing to the student, the parent, the staff member, and the principal.

3. If the grievance is not resolved to the satisfaction of the student, he may appeal the district superintendent's decision to the Superintendent of Schools in writing within 3 school days.

   The Superintendent of Schools or his designee shall meet with the student, parent or the ombudsman, the staff member and his representative, within 10 days in attempt to resolve the matter.

   The decision of the Superintendent of Schools shall be communicated in writing to all parties previously involved within 5 school days.

   The decision of the Superintendent of Schools shall be final and binding upon all parties subject only to judicial review.

   The grievance procedure in no way abrogates the rights of students to seek relief in the Courts.

   Every effort should be made by the student and teacher, principal, parent, or other, to resolve the grievance informally with or without the assistance of the student ombudsman.

   Through each step in the grievance procedure teachers, principal, parent, and others against whom the grievance is lodged, may be represented by an official of their organization (PFT, Principals' Association, Legal Counsel, etc.).

Supplementary Permanent Injunctive Decree — October 7, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action No. 69-H-266

DAN SULLIVAN, by next friend,
DANIEL H. SULLIVAN, et al.,

plaintiffs,

—against—

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

defendants.

The decree herein is intended to elaborate, explain and clarify the terms of this Court's decree of December 30, 1969. It does not purport to change or modify, in any manner, the terms of that original decree. When terms and phrases which were defined in the original decree are employed herein, they are to be understood as defined in the original decree. It is hereby ordered as follows:

1. Respondents are permanently enjoined from requiring a covered student to submit a publication for advance approval by any person or group of persons as a condition to the student's right to distribute the publication.
2. Respondents are permanently enjoined from interfering with the right of a covered student to distribute written material by reason of the material's advocacy of illegal action or advocacy of disobedience to published rules on student

conduct adopted by the Board of Trustees, except as described below.

3. Respondents are permanently enjoined from enforcing any absolute prohibition on the sale of any publication by a covered student prior to the commencement of classes in the morning. As employed in the Court's decree of December 30, 1969, the term "obscene material" means that material which, considered as a whole, is devoted to the description or depiction of nudity, sexual activity, or generically similar matters in such a way that the material

> (1) predominantly appeals to the prurient, shameful or morbid interest for minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."

Respondents are permanently enjoined from further interfering with the rights of covered students based upon interpretation of the term "obscene material," except as that term has been hereinabove defined. Respondents are further permanently enjoined from interpreting the term "adult community," as hereinabove employed, except as the entire body of adult residents of the Houston Independent School District.

5. Respondents are permanently enjoined from enforcing any regulation which proscribes the

distribution of written material on the basis of its content (except when such material is libelous or obscene as defined above and in the Court's original decree) *unless* (1) respondents have convincing and credible evidence that the distribution of the written material will result in or significantly contribute to substantial and material interference with "normal classroom activity" or "normal school function" as those phrases were defined in the original decree; *and* (2) respondents, before they act against students distributing such written material, have made good faith but unsuccessful attempts to discipline the person or persons provoking such substantial and material interference.

6. Respondents are permanently enjoined from requiring any student to leave the premises of the school as a result of a suspension imposed for a period of more than three days unless and until respondents have complied with the due process requirements of the original decree.

7. Respondents are permanently enjoined from converting a suspension of three days or less into a longer suspension unless, during the three day suspension and after the decision to impose a three day suspension is made and implemented, additional and new evidence concerning the student is discovered which warrants a longer suspension. In such event, respondents must either (1) satisfy the due process requirements of the original decree before the expiration of the original three day period;

or (2) allow the student to return to school at the end of the three day (or less) suspension period and remain in school until the due process requirements are satisfied.

8. As employed in the Court's decree of December 30, 1969, the phrase "dispassionate and fair consideration of substantial evidence" means that a hearing for a suspended student must be conducted by, and any decision to suspend must be made by, some one or more persons who are impartial and disinterested, excluding any person or persons whose acts, judgment or decisions are at issue in said hearing.

9. Respondents are permitted to act in violation of any and all provisions of the Court's decree of December 30, 1969, and in violation of any and all such provisions as herein supplemented, only in the event that respondents or their respresentatives make a reasonable determination that such compliance would risk the creation of a situation which poses immediate peril to life, health or property; *and*, only for that period of time during which respondents reasonably deem such emergency actually to exist.

10. Any covered student who hereafter invokes the equitable powers of this Court to enforce the terms of the Court's decree of December 30, 1969, or the terms of that decree as supplemented herein, must establish his compliance

with the equitable doctrine of clean hands, which requirement obliges every such student to comply with all directions given him by respondents in the situation which forms the basis of the students' complaint, regardless of the student's opinion of the propriety or legality of those directions.

The Memorandum Opinion and Order of the Court dated June 23, 1971, is hereby adopted by the Court as a statement of the findings of fact and conclusions of law to be considered in support of this decree.

The Clerk will file this Supplementary Permanent Injunctive Decree, and provide counsel for all parties with true copies.

Dated at Houston, Texas, this 7th day of October, 1971.

WOODROW SEALS
United States District Judge

* * *

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2494

DAN SULLIVAN, By Next Friend,
DANIEL H. SULLIVAN, ET AL.,
Plaintiffs-Appellees,

and

PAUL KITCHEN, By Next Friend, ANTHONY KITCHEN,
Plaintiff-Appellee-
Cross Appellant,

versus

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants-
Cross Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(March 15, 1973)

Before GEWIN, THORNBERRY and CLARK,
Circuit Judges.

THORNBERRY, Circuit Judge: This case arises from the unauthorized distribution of an "underground" newspaper near a high school campus, and presents the now-familiar clash between claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools conducive to learning, on the other. We vacate the supplemental grant of injunctive relief to plaintiff-appellee Paul Kitchen. In doing so, we hope to furnish guidelines that will prove helpful to all parties — students, school officials, and courts — in balancing the competing interests in this delicate and crucial area of the law.

The case is here on appeal from an order of the district court supplementing a 1969 permanent injunction. The facts giving rise to that first permanent injunction are set out at 307 F.Supp. 1328, and need not be recounted here. Suffice it to say that Dan Sullivan and another student at Sharpstown High School in Houston had been summarily expelled for distributing, free of charge, a publication of their own creation, *Pflashlyte*. This disciplinary action had been taken ostensibly as punishment for the boys' violation of an extremely vague regulation of the Houston Independent School District[1] and of the school principal's unwritten and unannounced interpretation of that regula-

[1]That regulation read as follows:

> The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command.

tion.[2] The boys filed suit in the court below seeking declaratory and injunctive relief under 42 U.S.C. § 1983. After issuing a comprehensive memorandum, Judge Woodrow Seals set out detailed requirements to be met by the School District in regulating student distribution of literature on or near the campus and in disciplining students for violations of school regulations.[3] The School District appealed from this order,

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[2]The School District stipulated that

> the rule [quoted above] is construed by responsible officials of the Houston Independent School District to prohibit the type of publication and distribution engaged in by Michael Fischer and Dan Sullivan in February and March of 1969.

[3]In a permanent injunction decree and declaratory judgment rendered on December 30, 1969, Judge Seals enjoined the School District from promulgating or enforcing any regulation dealing with the production or distribution of written materials by tenth, eleventh, and twelfth grade students, unless the regulation was in writing and students were given notice of the rule, and unless it met the following conditions:

> (1) The rule must be specific as to places and times where possession and distribution of published materials is prohibited.
>
> (2) The rule must be understandable to persons of the age and experience of covered students.
>
> (3) The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject any written material being distributed subject to the rule.
>
> (4) The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal classroom activity or normal school function. . . . [There follow definitions of "normal classroom activity" and "normal school function."]

but the appeal was dismissed on the District's own motion on May 21, 1970.

Rather than prosecute the appeal, the School District chose to formulate a new set of regulations. A biracial committee of students, school officials, parents, attorneys, and representatives of other interested groups held hearings and developed an extensive set of regulations dealing with various aspects of school discipline. The rules required prior submission to the

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(5) The rule must not subject any covered student to the threat of discipline because of the reaction or the response of any other person to the written material, provided, however, that defendants and their successors in office may prohibit distribution of obscene material or of libelous material for which a cause of action may exist in some person."

In addition, the decree set out the following requirements that the District was to meet in imposing "substantial discipline" (i.e., suspension for more than three days, or for an indefinite period):

(1) The covered student and at least one of his parents or guardian shall be furnished, either in person or by mail directed to the student's last known address, with written notice of the charges and of the nature of the evidence against such covered student.

(2) The covered student and at least one of his parents or guardian shall be offered a formal hearing after sufficient time to prepare a defense or reply at which hearing evidence in support of the charge shall be presented by school officials and the affected covered student or his parent or guardian shall have ample opportunity to present any defense or reply.

(3) The decision of school officials to impose such discipline shall be based upon a dispassionate and fair consideration of substantial evidence that the covered students committed the acts for which discipline is to be imposed and that such acts are in fact a proper reason for such discipline.

school principal of all publications, not sponsored by the school, which were to be distributed on the campus or off campus in a manner calculated to result in their presence on the campus. The principal was given one working day to review the publication before general distribution. If, in the opinion of the principal and School District attorneys, the publication contained "libelous or obscene language or advocate[d] illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees," then the principal could withhold his approval of the publication and it could not be distributed. The rule provided, however, that distribution could not be prohibited because the publication "contained the expression of any idea, popular or unpopular." Besides requiring prior submission, the regulation expressly permitted distribution before and after school hours on school premises, absolutely prohibited the sale of publications on school premises and the distribution of political campaign material or material consisting primarily of commercial advertising, and required that the publication contain the names of the contributors, editors, and publishers.

In addition to these provisions governing distribution of publications, the new regulations contained specific provisions governing suspension procedures. For violation of any published regulation of the School District governing student conduct, a student could be suspended for a reasonable time not exceeding three school days upon the giving of written notice to parents or guardian of the reasons for the suspension. If the suspension was to last for more than three school days

or for an indefinite period, the student and his parents or guardian were entitled to written notice of the reasons for suspension and were to be offered a prompt hearing before the principal, at which they could produce witnesses and be assisted by counsel. The student was to be given the right to appeal the principal's decision to the assistant superintendent for a *de novo* hearing. The assistant superintendent could affirm the principal's decision if the *de novo* hearing produced substantial evidence supporting it, and the student could appeal the assistant superintendent's decision to the School Board. The School Board adopted the new regulations in February or March 1970, and copies were posted in each school building in the District. Several months later, the event occurred that forms the basis for the instant appeal.

Before classes started on the morning of October 20, 1970, Paul Kitchen, a junior student at Waltrip Senior High School, was standing near an entrance to the campus selling *Space City!*, an "underground" newspaper, to students as they entered the campus. Gordon Cotton, the Waltrip principal, purchased a copy and scanned its contents. On the second page he noticed a letter, captioned "High Skool is F. . .ed" and containing several other instances of coarse language. Mr. Cotton told Paul that he was selling the papers in violation of the prior submission rule, and asked him to stop. Paul continued selling the papers. At this point, Mr. Cotton determined to suspend Paul for his failure to comply with both the prior submission rule and Mr. Cotton's request that he stop selling the papers. Before Paul was sent home, Mr. Cotton notified both his par-

ents by telephone that Paul was being suspended and told them the reasons for his decision. Mr. Cotton requested that both parents come to the school for a conference, but Mr. Kitchen replied that his job would prevent his attending a conference until six days later. A conference was agreed to be held on October 26, 1970, and it was agreed that Paul would remain on suspension until that date. As Paul was leaving Mr. Cotton's office after being informed that he was to be suspended, he slammed the door and shouted "I don't want to go to this goddamn school anyway" within the hearing of two of Mr. Cotton's female assistants.

During the period of Paul's agreed suspension between October 20 and October 26, he returned to the campus several times purportedly to talk with his teachers. Each time school officials told him to leave the campus because students were not allowed on school premises while under suspension. On the morning of October 26, the day on which the conference with Paul's parents was scheduled, Paul was again at the entrance to the campus selling *Space City!* to students on their way to school. Mr. Cotton showed Paul a copy of the prior submission rule, and told him that if he did not stop selling the papers he would call the police. In response, Paul shouted "the common Anglo-Saxon vulgarism for sexual intercourse" in apparent reference to Mr. Cotton. Paul was taken to the police station but was released without charges having been filed. Mr. Kitchen otbained legal counsel and failed to appear for the scheduled conference with Mr. Cotton. Later that day, Mr. Cotton notified Paul's parents in writing that he was suspending Paul for violat-

ing the prior submission rule and using profanity in the presence of his secretary, and informed them of the suspension procedures available to students and parents under the new regulations.

On October 29, 1970, Mr. Cotton conducted a hearing at which Paul was represented by counsel. Following the hearing Mr. Cotton suspended Paul for the remainder of the semester, on the basis of Paul's violation of the prior submission rule and his use of profanity toward Mr. Cotton. A *de novo* appellate hearing was conducted before the assistant superintendent on November 9, 1970. Paul appeared with his father and an attorney; an extensive evidentiary hearing was held during which witnesses were cross-examined and testimony was transcribed by a court reporter. The assistant superintendent affirmed Mr. Cotton's decision; and the transcript of the appellate hearing was reviewed by the Deputy Superintendent for Secondary Schools and the Superintendent for Instruction and Administration, who both affirmed the suspension.

On November 23, 1970, Paul and his father applied in the court below for an order holding the School District in contempt for violating the 1969 permanent injunction, and for supplementary injunctive relief and damages in aid of the injunction. On the following day the court entered an *ex parte* temporary restraining order directing that Paul be permitted to attend classes at Waltrip High School; without the consent of the School District, this temporary restraining order was extended for ten-day periods for a total of fifty-nine days. At the direction of the court, a four-hour hearing

was held before the School Board, at which Paul and his father, represented by counsel, presented and cross-examined witnesses. The Board declined to entertain a facial challenge to the new regulations, ordered Paul suspended for an additional two weeks beginning January 4, 1971, and directed that he be placed on probation for the remainder of the school year.

Following a hearing, the court below chastised Paul for not challenging the new regulations by orderly means, found that he had been unlawfully suspended, ordered that he be allowed credit for school work missed during the suspension, and declined to hold the School Board in contempt or award damages or attorney fees because the defendants had acted in good faith. On October 7, 1971, the court issued a supplementary injunctive decree, clarifying and elaborating the terms of its original 1969 injunction. Both sides appeal, urging a myriad of contentions regarding the trial court's refusal to vacate the 1969 permanent injunction, the reasons for suspending Paul, the procedures used in his suspension, and the failure to award damages and attorney fees. The view we take of this case makes it necessary for us to address only a few of these contentions.

I

On appeal and in the court below, Paul Kitchen's position has been, basically, that his selling the newspaper was an activity protected by the First Amendment. Pointing to the fact that sale of the newspaper created little, if any, disruption of normal school activi-

ties — let alone the "material and substantial" disruption required by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969), and its progeny — he argues that the prior submission rule was unconstitutionally applied to him. He claims further that the language in the newspaper was not constitutionally obscene and that therefore the school officials could not suppress it. In our view, however, Paul's conduct in the instant case outweighs his claim of First Amendment protection, and gave school officials sufficient grounds for disciplining him.

As the court below recognized when it rebuked Paul for failing to challenge the prior submission rule by "lawful" means, Paul's conduct can hardly be characterized as the pristine, passive acts of protest "akin to pure speech" involved in *Tinker, supra*. Rather, Paul defied Mr. Cotton's request that he stop selling the newspapers, persisted in returning to the campus during the initial six-day suspension period, and twice shouted profanity at Mr. Cotton within the hearing of others. Paul's reappearance on the campus and continued sale of the newspapers on October 26 served only to exacerbate the situation.

Moreover, Paul never once attempted to comply with the prior submission rule. Given the widespread publicity accorded the new rules, it taxes credulity to say that on October 20 Paul was unaware of the rule requiring prior submission; he most certainly knew about the rule after Mr. Cotton showed him a copy on October 26 before suspending him for a second time. Had Paul submitted the newspaper prior to distribution and had

it been disapproved, then he could have promptly sought relief in the courts without having been first suspended from school. Having chosen to disregard established school policy regarding distribution of off-campus literature, Paul's opportunity for obtaining relief from the principal's decision was delayed by several months of administrative appellate hearings, during which his academic career suffered severely from continued suspension.

Considering Paul's flagrant disregard of established school regulations, his open and repeated defiance of the principal's request, and his resort to profane epithet, we cannot agree that the school authorities were powerless to discipline Paul simply because his actions did not materially and substantially disrupt school activities. In the years since *Tinker* was decided courts have refused to accord constitutional protection to the actions of students who blatantly and deliberately flout school regulations and defy school authorities. Thus, in *Schwartz v. Shucker*, E.D.N.Y. 1969, 298 F.Supp. 238, a high school student disregarded several prior warnings of the principal not to distribute literature without prior permission. The court declined to reach the student's constitutional arguments and refused to grant him injunctive relief because he had failed to challenge the principal in an orderly manner. The same result was reached in *Graham v. Houston Independent School District*, S.D.Tex. 1970, 335 F.Supp. 1164, where Judge Ingraham of this court, sitting as a district judge by designation, based his denial of injunctive relief on the student's disregard of established school regulations. *See also Duke v. North Texas State*

Univ., 5th Cir. 1972, ____ F.2d ____ [No. 71-3198, November 10, 1972]; *Esteban v. Central Missouri State College*, 8th Cir. 1969, 415 F.2d 1077; *Quarterman v. Byrd*, 4th Cir. 1971, 453 F.2d 54, 60 n. 11. Finally, in *Healy v. Janes*, ____ U.S. ____, 92 S.Ct. 2338 (1972), the Court approved the principle that the open disregard of school regulations is a sufficient and independent ground for imposing discipline, when, citing *Esteban, supra*, it held that a student group's announced refusal to abide by campus regulations would be a proper reason for denying university recognition to the group. 92 S.Ct. at 2351-52.

It may be noted that the regulations in the instant case are the product of an extensive and good faith effort by the School District to formulate a valid code of student conduct. This court has recognized that there is nothing *per se* unreasonable about requiring a high school student to submit written material to school authorities prior to distribution. *Shanley v. Northeast Independent School Dist.*, 5th Cir. 1972, ____ F.2d ____ [No. 72-1264, June 9, 1972].[4] And it cannot be seriously urged that this prior submission rule is unconstitutionally vague or overbroad; this court has

[4]Both *Shanley* and *Eisner v. Stamford Bd. of Educ.*, 2nd Cir. 1971, 440 F.2d 803, require that prior submission rules include procedures for prompt administrative review of a decision not to permit distribution. The regulations of the Houston Independent School District contain no such procedure for appellate review. However, since Paul never submitted the newspaper for prior approval in the first place and since he was given two extensive *de novo* appellate hearings in which he could have urged approval of the newspaper for distribution, this defect in the prior submission rule should not affect the result in the instant case.

recently upheld a statute cast in more general terms than is the rule in question here. *Pervis v. LaMarque Independent School Dist.*, 5th Cir. 1972, ____ F.2d ____ [No. 71-3434, September 19, 1972]. Finally, it is undisputed that substantial evidence supported Paul's suspension. Accordingly, we limit our review of his suspension to the question whether the School District accorded him due process.

We hasten to point out that by thus limiting our review in this case we do not invite school boards to promulgate patently unconstitutional regulations governing student distribution of off-campus literature. Nor, needless to say, do we encourage school authorities to use otherwise valid regulations as a pretext for disregarding the rights of students. Today we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands.

II

As to the procedures used in his suspension, the thrust of Paul's attack is that the October 29 hearing before Mr. Cotton was not the "fair and dispassionate" hearing required by due process and by the original permanent injunction. Although this court has never adopted a rule that school administrative personnel involved in the initiation and investigation of charges are *per se* disqualified from conducting hearings re-

lated to those charges, *see Murray v. West Baton Rouge Parish School Bd.*, 5th Cir. 1973, ____ F.2d ____ [No. 72-1871, January 19, 1973]; *Duke, supra; Lance v. Thompson*, 5th Cir. 1970, 432 F.2d 769; *cf. Wasson v. Trowbridge*, 2nd Cir. 1967, 382 F.2d 807; *Jones v. State Bd. of Educ.*, M.D. Tenn. 1969, 279 F.Supp. 190, *aff'd*, 6th Cir. 1969, 407 F.2d 834, *cert. dism'd*, 397 U.S. 1, 90 S.Ct. 779 (1970), we have uniformly recognized that the facts of a case may demonstrate that a school official's involvement in an incident is such as to preclude his affording the student an impartial hearing. *E.g. Murray, supra; cf. Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499 (1971). In our view, Paul Kitchen made such a showing in the instant case. The incidents for which Paul was suspended were cast largely in terms of a personal confrontation with Mr. Cotton. On two occasions Paul used profanity toward him, and Paul's appearance on the campus on October 26 to resume sales of the newspaper was clearly a direct challenge to Mr. Cotton's earlier demand that Paul stop selling the newspaper. Under these circumstances it is difficult to imagine that Mr. Cotton could have given Paul an impartial hearing. Indeed, it is not surprising that Mr. Cotton's primary aim in conducting the October 29 hearing was not to hear Paul's side of the story but rather, as Mr. Cotton testified in the district court, to hear Paul apologize.

It is, however, well settled that a procedural defect in an initial hearing before school officials can be cured by subsequent hearings. *Murray, supra; Speake v. Grantham*, 5th Cir. 1971, 440 F.2d 1351, *aff'g* S.D. Miss.

1970, 317 F.Supp. 1253.[8] In the instant case, Paul was afforded two extensive *de novo* appellate hearings at which he was represented by counsel and presented and cross-examined witnesses. In our view, the procedural fidelity that characterized these appellate hearings cured the procedural defect in the hearing before Mr. Cotton.

We believe that a further word is necessary with regard to the timing of Paul's hearings, although neither party raises the issue directly. The question whether, and under what circumstances, disciplinary action must be preceded by a hearing has recently been before this court on a number of occasions. *Black Students of North Fort Myers Jr.-Sr. High School v. Williams*, 5th Cir. 1972, ____ F.2d ____ [No. 72-1667, December 27, 1972] (hearing required before imposition of up to ten days' suspension); *Pervis, supra* ("an even more basic tenet of due process is ... that punishment cannot be imposed before a hearing is given"); *Dunn v. Tyler Independent School Dist.*, 5th Cir. 1972, 460 F.2d 137 (no hearing required for "minor" punishment such as three days' suspension); *Banks v. Bd. of Public Instruction*, S.D. Fla. 1970, 314 F.Supp. 285 (3-Judge court), *vacated for entry of single-judge order*, 401 U.S. 988, 91 S.Ct. 1223 (1971), *aff'd after remand*, 5th Cir. 1971, 450 F.2d 1103 (no prior hearing required for suspension up to ten days). In this case, Paul was suspended initially for an agreed period of six days without having been given a prior hearing. The lack of a hear-

[8] We note that the facts of the instant case are distinguishable from those in *Pervis, supra*, where no hearing was held until three months after the students' summary suspension.

ing, however, was due to the unusual requirements of Mr. Kitchen's work which prevented his attendance until six days after the suspension had been imposed. On October 26, Mr. Cotton again suspended Paul, this time indefinitely. No hearing was held until three days later. But it must be recalled that the October 26 hearing would have taken place and the second suspension might not have occurred if Paul had not returned to campus on October 26 and resumed selling the newspapers, an event that triggered Mr. Cotton's calling the police and Mr. Kitchen's refusal to attend the October 26 hearing. Under these circumstances, and considering Paul's part in the delay, we decline to hold that the lack of a prior hearing was a denial of due process. The hearing was held as soon as circumstances would permit.

All that remains is the question whether the court below abused its discretion in denying the School District's motion made pursuant to Rule 60(b), F.R.Civ.P., to vacate the original 1969 permanent injunction. The School District's position is that, by promulgating new regulations that literally comply with the conditions set out in the injunction, the 1969 judgment has been "satisfied," and there is no longer any need to keep the School District under threat of a contempt judgment for violating the injunction. Granting relief pursuant to Rule 60(b) is largely within the discretion of the trial court, *Elgin National Watch Co. v. Barrett*, 5th Cir. 1954, 213 F.2d 776, and we are unable to say that the court below abused that discretion in failing to vacate the injunction. The original injunction dealt not only with the promulgation of regula-

tions, but also with their enforcement. The School District has failed to show that continuation of the 1969 injunction is unnecessary to insure that the rules will not be unconstitutionally applied to students in the future. Although the District cites extensive authority for the familiar proposition that school discipline is primarily a matter for school authorities, the treatment that we give the instant case recognizes the District's right to impose punishment for violation of its established regulations. We decline to disturb the trial court's choice not to vacate the 1969 permanent injunction.

With the exception of that part of the order denying the School District's motion to vacate the 1969 injunction, the supplemental injunction decree entered on July 6, 1971, and the supplementary permanent injunctive decree entered on October 7, 1971, are vacated with instructions that the suit be dismissed.

VACATED WITH INSTRUCTIONS.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1972

No. 71-2494

D.C. Docket No. CA 69-H-266

DAN SULLIVAN, By Next Friend, DANIEL H. SULLIVAN, et al.,
Plaintiffs-Appellees,

and

PAUL KITCHEN, By Next Friend, ANTHONY KITCHEN,
Plaintiff-Appellee-Cross Appellant,

and

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellants-Cross Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated with instructions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees and plaintiff-appellee-cross appellant pay to defendants-appellants-cross appellees the costs on appeal to be taxed by the Clerk of this Court.

March 15, 1973

Issued as Mandate: May 8, 1973

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 71-2494

DAN SULLIVAN, By Next Friend, DANIEL H. SULLIVAN, et al.,

Plaintiffs-Appellees,

and

PAUL KITCHEN, By Next Friend, ANTHONY KITCHEN,

Plaintiff-Appellee-Cross Appellant,

versus

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants-Appellants-Cross Appellees.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 15, 1973, 5 Cir., 1973, F.2d).
(, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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SEP 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1973

NO. 73-379

DAN SULLIVAN, BY NEXT FRIEND,
DANIEL H. SULLIVAN, ET AL.,
and
PAUL KITCHEN, BY NEXT FRIEND,
ANTHONY KITCHEN, *Petitioners*
v.
HOUSTON INDEPENDENT SCHOOL DISTRICT,
ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term 1973

NO. 73-379

DAN SULLIVAN, BY NEXT FRIEND,
DANIEL H. SULLIVAN, ET AL.,
and
PAUL KITCHEN, BY NEXT FRIEND,
ANTHONY KITCHEN, *Petitioners*

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,
ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinions of the Courts below are accurately and adequately stated in Petitioners' Brief.

Jurisdiction

The jurisdiction is adequatey stated in Petitioners' Brief.

Questions Presented

1. Whether the Court was correct in approving the regulation that material be submitted to the principal prior to distribution on school grounds.

2. Whether the Court properly balanced the First Amendment rights of Paul Kitchen with the responsibility of school authorities to maintain the educational environment.

Statement Of The Case

This action began in 1969 with the filing of a complaint pursuant to 42 U.S.C. § 1983, by two minor Plaintiffs, Dan Sullivan and Michael Fisher, seeking reinstatement to Sharpstown Senior High School and injunctive and declaratory relief for themselves and others similarily situated from certain regulations of the Houston Independent School District (District). The District Court issued a memorandum opinion on November 17, 1969, 307 F.Supp. 1328 (S.D. Tex.) followed by a Permanent Injunction Decree and Declaratory Judgment on December 30, 1969. The District appealed from the order; however, it was dismissed on the District's motion on May 21, 1970.

Rather than prosecute on appeal, The Board of Education (Board) created the Student Relations Committee (Committee) to formulate rules for student conduct which would be reasonable, in conformity with the decree of the District Court, and in harmony with constitutional principles. The Committee was comprised of two members of the Board (one man, one woman), the general superintendent, two assistant superintendents, two students (one black girl, one white boy), three attorneys,

the President of the Parents League of Houston, the Executive Director of the Houston Metropolitan Ministries, a representative of the Harris County Drug Abuse Program and the President of the City Council Parent-Teacher Association (R. 983-88).

The Committee conducted three extensive public hearings in which a substantial number of people of all ethnic, economic, and political backgrounds, students, teachers, principals, administrators, parents, interested citizens and attorneys testified (R. 986-89).

The public hearings and the deliberations of the Committee resulted in a draft of regulations which was presented to the Board. After careful deliberation and further discussion at a public meeting in late February or early March, 1970, the Board adopted in toto the recommendations of the Committee as the Supplemental Policies Concerning Student Conduct of the District (Appendix A), and they were distributed throughout the District and posted in each school building.

On October 20, 1970, Paul Kitchen, a junior student at Waltrip Senior High School, was standing near an entrance to Waltrip Senior High School selling the subterranian publication, *Space City!* to the students as they entered the school grounds. Paul's location was such that after a student passed Paul he had to enter the school grounds because the street on which he was standing dead ends into the school parking lot (R. 473). The sales of *Space City!* by Paul Kitchen, even though off campus, were calculated to and did result in the papers being brought into the school. Paul recognized that the newspapers probably would cause disruptions on campus and warned the purchasers to be careful how they handled the papers at school (R. 918-23). Paul instructed the

students that they were taking the papers into the school at their own risk (R. 921-23).

Gordon Cotton, principal at Waltrip, went to the place where Paul was selling *Space City!* purchased a copy and read several pages. Mr. Cotton told Paul that he was selling the papers without first complying with the published Board policies concerning distribution on campus. Paul had not complied with the Supplemental Policies Concerning Student Conduct which requires that such material be submitted to the principal twenty-four (24) hours prior to the planned distribution (R. 501, 917; Appendix A). Mr. Cotton reminded Paul that he was selling the papers in violation of Board policy and asked him to stop, but that he could sell the papers after school at the entrances if he so desired (R. 175-76). Paul defied the principal and continued selling the papers.

Paul was temporarily suspended from school because of his failure to submit the paper prior to distribution and because of his continued violation of school policy (R. 501-06).

As Paul left Mr. Cotton's office on October 20, 1970, after being informed that he was temporarily suspended for violating Board policy, he slammed the door to Mr. Cotton's office and shouted "I don't want to go to this goddamn school anyway!" (R. 507-1079). These events took place within the hearing of Mr. Cotton's secretary and clerk, both of whom were women.

Paul persisted in coming back on the school grounds during the period of his agreed suspension between October 20, 1970, and October 26, 1970. On separate occasions, Paul was told by Mr. William O. Weygandt, the assistant principal, and Mr. Nelson Millender, the driver education teacher, to leave the school and not to return

until the conference with Mr. Cotton on October 26, 1970 (R. 1079-80, 1105-07). Mr. Weygandt told Paul it was against Board policy for a student to return to school grounds during the period of suspension and that if he were caught on the grounds again he would have to call the police and have him picked up (R. 1080).

On the morning of October 26, 1970, the day on which Mr. Cotton and Mr. Kitchen had agreed to have a conference regarding Paul's situation, Paul was again selling *Space City!* near the place where he had been selling the newspapers on October 20, 1970 (R. 571). Paul tried to run away when he saw Mr. Cotton coming with Mr. James H. Vann, a math teacher; however, Mr. Cotton finally was able to confront Paul and show him a copy of the Board policies on the distribution of literature on campus (R. 436, 1099), which were posted on the bulletin board in each classroom at Waltrip Senior High School. After handing Paul a copy of the Supplemental Policies Concerning Student Conduct, Mr. Cotton told Paul he would be picked up by the police if he did not stop selling the papers in violation of the published Board policy. With numerous students within hearing, Paul responded by yelling "communism! communism! . . . fuck you! (Mr. Cotton) and fuck the pigs! (the police)" (R. 436, 1099-1100).

Subsequently Paul was taken to the police station and released, following which Mr. Kitchen obtained legal counsel and refused to appear for the conference on October 26, 1970, as previously agreed.

A hearing was held in Mr. Cotton's office on October 29, 1970, at which Paul was represented by his legal counsel, Mr. Eric Nelson. Following the hearing, Paul was suspended for the remainder of the semester on the

grounds that: (1) he had violated published Board policy pertaining to publications, and (2) he used profane and obscene language ("goddamn" and "fuck") toward his Principal, Mr. Cotton, on the two occasions (R. 524-25).

The decision of the Principal was appealed to the Assistant Superintendent, and a de novo hearing was held on November 9, 1970. The decision to suspend Paul for the remainder of the semester was affirmed by the Assistant Superintendent. The transcript of that hearing was reviewed by the Deputy Superintendent for Secondary Schools and the Superintendent for Instruction and Administration, who affirmed the decisions of the Principal and Assistant Superintendent (R. 526-527).

On November 23, 1970, Paul and his father filed this suit as a contempt action under the Permanent Injunction and Declaratory Judgment of December 30, 1969. On the following day, the District Court entered a temporary restraining order without notice or hearing directing that Paul be permitted to attend classes and exercise all the usual rights and privileges of students at Waltrip Senior High School. This temporary restraining order entered on November 24, 1970, was extended by the Court, without agreement of the parties, for subsequent ten (10) day periods extending through February 13, 1971, a total of fifty-nine (59) days.

At a conference in chambers on December 3, 1970, District Judge Woodrow Seals directed the parties to hold a hearing before the Board of Education of the District. A hearing was held before the Board on December 16, 1970, at which Paul and his father appeared with their attorneys. They presented witnesses and evidence, made arguments and cross-examined witnesses. A court reporter was present at the hearing, which lasted for four hours.

Based on the evidence presented at the hearing, the Board held that Mr. Cotton acted in good faith and in accordance with the published Board policy, and that Paul violated the published Board policy and by his actions was guilty of insubordination. The decision of the Board of Education was that Paul be suspended for two (2) weeks beginning January 4, 1971, and that he be placed on probation for the remainder of the 1970-71 school year (R. 528-29, 542-43).

The hearing before the District Court began on February 8, 1971, and was concluded on February 18, 1971. On June 23, 1971, the District Court entered its Memorandum Opinion and Order in which it chastised Paul for not challenging the legally enacted rules through lawful means, found Paul Kitchen had been improperly suspended, and ordered that he be allowed credit for school work missed during the time of suspension. The Court found that Gordon Cotton and the School Board had acted in good faith, thereby refusing to hold them in contempt of the Permanent Injunction and Declaratory Judgment of December 30, 1969. This Opinion was followed on July 6, 1971, by an Injunction Decree Granting Supplementary Injunctive Relief in Aid of the Permanent Injunction Decree which incorporated as findings of fact and conclusions of law the June 23, 1971, Memorandum Opinion and Order. On October 7, 1971, the District Court entered a further Memorandum Opinion and Supplementary Permanent Injunction Decree proscribing the enforcement of certain provisions of the Supplemental Policies Concerning Student Conduct.

Both the District and Paul Kitchen appealed to the Court of Appeals for the Fifth Circuit. The Fifth Circuit left the Permanent Injunction and Declaratory Judgment

of December 30, 1969 in force but vacated the Supplemental Injunction Decrees of July 6 and October 7, 1971. The Fifth Circuit specifically upheld the constitutionality of the requirement that students submit written material to school authorities prior to distribution pursuant to *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). The Court further determined that "Paul's flagrant disregard of school regulations, his open and repeated defiance of the principal's request, and his resort to profane epithet" were sufficient reasons for the school authorities to discipline him.

Argument

I.

The Decision Below Is Correct And There Is No Conflict Among The Circuits

The Court of Appeals for the Fifth Circuit correctly held constitutionally acceptable the requirement that students submit material to the principal prior to distribution on the school grounds. The constitutionality of this procedure was approved by this Court in a non-public school environment. *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965).

In approving the Districts' prior submission requirement, the Fifth Circuit referred to procedural safeguards outlined in *Freedman v. Maryland, supra*, and recently enunciated by the Court in *Shanley v. Northeast Independent School District, supra*, by the Second Circuit in *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2nd Cir. 1971), and the Fourth Circuit in *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

While the First and Seventh Circuit Courts of Appeals in *Riseman v. School Committee*, 439 F.2d 148 (1st Cir.

1971) and *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972) seemingly reach a contrary result, both *Riseman* and *Fujishima* involved "prior approval" regulations rather than "prior submission" regulations as in the case *sub judice*.

In *Riseman v. School Committee, supra*, the regulation prohibited the use of pupils, staff members or facilities of the school in any manner for advertising or promoting "any community or non-school agency or organization *without the approval of the School Committee.*" 439 F.2d 148 (Emphasis added). Similarly, in *Fujishima v. Board of Education, supra*, the questioned regulation provided that no person could distribute books, tracts or other publications on school premises *"unless the same shall have been approved by the General Superintendent of Schools."* 460 F.2d 1355, 1356 (Emphasis added). The *Fujishima* Court did not consider this Court's ruling in *Freedman v. Maryland* that prior submission, even in the non-school environment was acceptable with proper procedural safeguards, and the *Riseman* Court simply noted that the regulation it considered did not reflect any effort to minimize the adverse affect of prior restraint as prescribed in *Freedman v. Maryland, supra.*

Unlike the "prior approval" regulations of *Riseman* and *Fujishima*, the regulation of the Houston District provides for "prior review." This review is not for approval but to determine whether the publication comports with the specific guidelines in the Supplemental Policies Concerning Student Conduct. Any publication can be distributed unless "the publication contains libelous or obscene language or advocates illegal action or disobedience to published school rules on student conduct adopted by the Board of Trustees." The District regulations specify that "distribution shall not be prohibited because the publication con-

tains the expression of any idea, popular or unpopular." (Appendix A). The principal has up to one working day to determine if the publication is of the type prohibited under the rules. Distribution may take place the next day unless the principal notifies the sponsors of the publication that he and the school attorneys have determined that the publication is subject to prohibition by the regulations.

The facts of the case *sub judice*, the regulations in question, and the application or non-application of the principles of *Freedman v. Maryland, supra,* differ significantly from those of *Riseman v. School Committee, supra,* and *Fujishima v. Board of Education, supra.*

Each case, therefore, must be evaluated separately. The decision of the Court below is correct and there is no conflict among the Circuit Courts of Appeals.

II.

Independent, Non-Constitutional Grounds Support The Suspension Of Paul Kitchen; Therefore, This Court Need Not Reach Any Constitutional Questions

After being notified that he was being sent home until a conference could be held with his parents, Paul shouted "I don't want to go to this goddamn school anyway" as he left the principal's office on the morning of October 20, 1970. 475 F.2d 1071, 1074. This was said within the hearing of the principal's two female assistants.

On the morning of October 26, 1970, Paul was again selling papers at the school gate to students as they came onto the school grounds. Mr. Cotton, the principal, gave Paul a copy of the Supplemental Policies Concerning Student Conduct and asked him to comply. Paul responded in a loud voice, within the hearing of a number of his

fellow students, "fuck" with direct reference "you" (Gordon Cotton) and to the "pigs" (the police). Such action by a student constitutes "gross disrespect" for the student's principal and as such, is not an activity entitled to constitutional protection. A suspension may be based on such action by a student. *Jones v. State Board of Education for Tennessee,* 279 F.Supp. 190 (M.D. Tenn.) 407 F.2d 834 (6th Cir. 1969) cert. dism'd 397 U.S. 31, 90 S.Ct. 779 (1970); *Norton v. Discipline Committee of East Tennessee State University,* 419 F.2d 195 (6th Cir. 1969) cert. denied 399 U.S. 906, 90 S.Ct. 2191 (1970). Also see *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 169) cert. denied, 398 U.S. 965, 90 S.Ct. 2169 (1970) and *Schwartz v. Schuker,* 298 F.Supp. 238 (E.D. N.Y. 1969).

Paul's references to the school, the principal and to the police in the context in which they were used and in the circumstances in which they were made are not protected speech, *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900 (1940). They are sufficient reasons in and of themselves to justify Paul's suspension under the Texas Education Code, §21.301. *Pervis v. LaMarque Independent School District,* 328 F.Supp. 638 (S.D. Tex. 1971) rev'd on other grounds 466 F.2d 1054 (5th Cir. 1972) and *Southern v. Dallas,* 318 F.Supp. 355 (N.D. Tex. 1970).

The Fifth Circuit specifically found that Paul's suspension was supported by substantial evidence. The Court also held that Paul's conduct in defying the principal, his persistence in returning to the school grounds during his agreed suspension, and his twice shouting profanity at Mr. Cotton within the hearing of students and others were sufficient grounds for the imposition of discipline. 475 F.2d 1071, 1076.

The District Court admonished Paul for his conduct: "Students should not be permitted to ignore, as movant did, legally enacted regulations of the school district. Even if such regulations impinge in the most flagrant manner upon the constitutional rights of a student, his remedy is to challenge the rules through lawful means." 333 F.Supp. 1149, 1176. Accordingly, the District Court declined to hold the School District or the Principal in contempt. Paul Kitchen appealed and the "clean hands" language of the Fifth Circuit is directed to Paul's appeal of his suspension. The Petitioner has taken those words out of the context of the Fifth Circuit opinion as well as the context of the school environment in attempting to raise a constitutional issue. The Fifth Circuit's references to the "clean hands" doctrine related to Paul's acts which were independent grounds for the disciplinary action taken and not a consideration of the First Amendment rights of free speech in the abstract.

This Court has stated it will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, N.Y. & Philadelphia Steamship Company v. Emigration Commissioners,* 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885). In *Burton v. United States,* 196 U.S. 283, 295, 25 S.Ct. 243, 245 (1905), this Court again stated the rule that, "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."

In the case of Paul Kitchen, it is not necessary to reach the alleged constitutional questions raised by the Petitioner. Paul's actions, independent of alleged First Amendment claims, were such that the school properly disciplined him. This Court should not pass upon the constitutional questions if there are other grounds on

which the case may be decided. *Light v. United States,* 220 U.S. 523, 31 S.Ct. 485 (1911) and *Siler v. Louisville & Nashville Ry. Co.,* 213 U.S. 175, 29 S.Ct. 451 (1909).

III.

There Are No Important Questions Of Constitutional Law As Applied In The Public School Environment

The First Amendment right of freedom of speech is one to which all citizens including school children are entitled. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733 (1969) and *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247 (1960). However, it is also recognized that freedom of speech is not absolute, and it is within the power of the state (school district) to regulate its exercise in certain situations. The state may regulate the freedom of speech as to the time, place, manner and duration if such regulation is reasonable. *Cox v. Louisiana,* 379 U.S. 599, 85 S.Ct. 476 (1965) and *Adderley v. State of Florida,* 385 U.S. 39, 87 S.Ct. 242 (1966). The right of an educational institution to adopt and enforce reasonable nondiscriminatory regulations as to the time, place and manner of student expression has often been recognized by the courts. *Tinker v. Des Moines Independent Community School District, supra; Burnside v. Byars,* 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena County Board of Education,* 363 F.2d 749 (5th Cir. 1966); *Sellers v. Regents of the University of California,* 432 F.2d 493 (9th Cir. 1970) cert. denied 401 U.S. 981, 91 S.Ct. 1194 (1971); *Guzick v. Drebus,* 431 F.2d 594 (6th Cir. 1970) cert. denied 401 U.S. 948, 91 S.Ct. 941

(1971) and, *Bayless v. Martine,* 430 F.2d 872 (5th Cir. 1969) cert. denied 406 U.S. 930, 92 S.Ct. 1775 (1972).

Some speech is not entitled to the protection of the First Amendment. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 62 S.Ct. 766 (1942). This Court in *Chaplinsky,* said that allowing the broadest scope of language and purpose to the First and Fourteenth Amendments it was understood that the right of freedom of speech is not absolute at all times and under all circumstances:

> There are certain well-defined and narrowly limited cases of speech, the prevention and punishment of which has never been thought to raise any constitutional problems. *These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.* It has been well observed that such utterances are no essential part of any expression of ideas, and are of such slight social value as to step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality. 315 U.S. 568, 571-72 (Emphasis added).

In *Chaplinsky,* this Court quoted *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900 (1940) for the following:

> *Resort to epithet or personal abuse is not in any proper sense communication of information or opinion safe-guarded by the Constitution,* and its punishment as a criminal act would raise no questions under that instrument. 310 U.S. 296, 309-310 (Emphasis added).

In attempting to maintain a public school environment conducive to the pursuit of educational goals, the rights of individuals do not exist in a vacuum as Petitioner suggests. The unique environment of the public schools requires a balancing of the rights of each individual with the individual and collective rights of other students, faculty and staff. School officials have the responsibility to follow the constitutional and statutory requirements of the state to create and maintain an environment where education will occur. This is the precise balancing accomplished by the Student Relations Committee in developing the Supplemental Rules Concerning Student Conduct which the Petitioner asks this Court to invalidate.

There are important differences between the educational environment of a public high school and that of a college; and between the educational environment and society in general. *Grayned v. City of Rockford,* 404 U.S. 820, 92 S.Ct. 2294 (1972). A rule regulating student conduct may be unreasonable in a college or university environment yet reasonable in a high school environment. Weighed against absolute rights must be the right and obligation to maintain an atmosphere in the public schools conducive to learning.

This Court has long recognized that the scope of the States' authority over children's activities is broader than over that of adults. *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S.Ct. 438 (1944). In *Ginsberg v. State of New York,* 390 U.S. 629, 88 S.Ct. 1274 (1968), the Court cited *Prince v. Commonwealth, supra,* in upholding the constitutionality of a New York criminal obscenity statute which prohibited the sale of certain materials to minors. The distinction between children and adults applies with equal or greater force when considering the application of school rules. *Gere v. Stanley,*

320 F.Supp. 852 (M.D. Penn. 1970) and *Sims v. Board of Education,* 329 F.Supp. 678 (D.N.M. 1971).

This Court has been at the forefront in recognizing distinctions between the college and public school environments when applying constitutional principles. *Healy v. James,* 408 U.S. 169, 92 S.Ct. 2338, 2350 (1972) and *Tilton v. Richardson,* 403 U.S. 672, 686, 91 S.Ct. 2091, 2099 (1971). The Courts of Appeal and the District Courts also have considered specific differences in environment between the public schools and colleges.

A basic distinguishing factor is the relative immaturity of high school students as compared with that of their college counterparts. *Schwartz v. Schucker, supra,* and *Mailloux v. Kiley,* 436 F.2d 565 (1st Cir. 1971). The District Court in *Whitsell v. Pampa Independent School District,* 316 F.Supp. 852 aff'd 439 F.2d 1198 (5th Cir. 1971), felt it important that:

> It should be kept in mind that the rule is applicable to minor students of high school age which presents a different factual situation than would exist in a case of more mature college or university students. Conduct which would effect discipline in secondary schools might go unnoticed and be of little or no influence with older students. 316 F.Supp. 852, 854.

In addition to the factor of immaturity, high school students, unlike college students are required by compulsory attendance laws to attend classes, and may have no choice as to curriculum or teachers. *Mailloux v. Kiley, supra,* and *Katz v. McAulay,* 438 F.2d 1058 (2nd Cir. 1971). The three judge court in *Banks v. Board of Public Instruction of Dade County,* 314 F.Supp. 285 (S.D. Fla., 1970, 3 Judge Court) vacated on other grounds. 401 U.S. 988, 91 S.Ct. 1223, (1971), recognized the

effect of compulsory education and class scheduling on the high school environment as compared to that of a college:

> There are significant factual distinctions between *Dixon* [Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.) cert. denied 368 U.S. 930, 82 S.Ct. 368 (1961)] and this case—between a college suspension and a public school suspension. For example in a college or university, teachers and students are rarely in class for more than a few hours a day, whereas in the public school system teachers and students are in class throughout the day. 314 F.Supp. 285, 292.

A final differentiating factor is directly related to those factors mentioned above. While the concept of *in loco parentis* has been almost uniformly rejected at the college level, the maturity level of public school students, the existence of compulsory education, the nature of class scheduling and parental expectations place the teachers and administrators of the public schools in some limited degree of *in loco parentis* to the students. *Mailloux v. Kiley, supra, Pervis v. La Marque Independent School District, supra, Axtell v. Lapenna,* 323 F.Supp. 1077 (W.D. Penn. 1971); and *Cordova v. Chonko,* 315 F.Supp. 953 (N.D. Ohio, 1970).

The Supplemental Rules Concerning Student Conduct as applied to Paul Kitchen and the public school students of the District are reasonable within the public school environment. As stated by the Court below this case presents "the now-familiar clash between claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools conducive to learning on the other." 475

F.2d 1071, 1072. The respective rights of all parties have been appropriately balanced, and there is no important constitutional question to be considered by this Court.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

BRACEWELL & PATTERSON

William Key Wilde
Counsel for Respondent
Houston Independent School
District, et al.

September 26, 1973

Certificate Of Service

Three true and correct copies of the foregoing Brief of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari have been served on Alan H. Levine, New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y., 10011, Attorney for Petitioner Paul Kitchen by mailing copies of the same by United States Mail, Airmail, with sufficient postage thereon and to Robert E. Hall, Dixie, Wolfe and Hall, Suite 401, 609 Fannin Street, Houston, Texas 77002, Attorney for Petitioner Paul Kitchen by hand delivering copies of the same to their offices, this _____ day of September, 1973.

William Key Wilde

APPENDIX

SUPPLEMENTAL POLICIES CONCERNING STUDENT CONDUCT

APPROVED BY THE BOARD OF EDUCATION OF HOUSTON INDEPENDENT SCHOOL DISTRICT

February 23, 1970

HOUSTON INDEPENDENT SCHOOL DISTRICT

Supplemental Policies Concerning Student Conduct

The Houston Independent School District has the responsibility of maintaining a high-quality education program for its students. To achieve this objective, the District must create an atmosphere for the attainment, exchange and application of ideas. School officials also have the responsibility of achieving an atmosphere free from disruptions and distractions that will materially interfere with or intrude upon the work of a school or its students. Many of our students have an awareness of and an involvement in issues and problems that exist in our community, our state, our nation and the rest of the world. We believe that as students discover their right they should also recognize their responsibilities. The proper balance of rights and privileges with duties, responsibilities and obligations is essential to the development of a creative school community. It is for the purpose of helping the student achieve the qualities of responsible citizenship that the Houston Independent School District, proudly recognizing the First Amendment rights established by our founding fathers, is establishing the following policies as guidelines for the schools, students, parents and citizens

who are concerned about the quality of education in Houston.

The rules contained herein supplement the rules and policies concerning student behavior set forth in the *Handbook for Principals and Teachers: Secondary Schools* (1968) and *Handbook for Elementary Schools* (1968) and supersedes such earlier rules and policies where inconsistent. The rules contained herein shall be posted on the bulletin boards in each school in the Houston Independent School District and shall be available to all interested persons.

Disruptions and Interferences with Educational Process

Any student who incites, encourages, promotes or participates, while at school or at school sponsored activities, in a riot, sit-in, walk out, blockage of entrances, or trespasses or otherwise substantially or materially interferes with normal educational processes shall, at the discretion of the principal, be suspended from school and such student may be charged with violating applicable municipal, state and federal laws.

Any student who wishes to promote, organize or participate in a demonstration or meeting on school premises, other than those sponsored by the school, must obtain prior approval from the principal. Before approving such request, the principal should determine that the demonstration or meeting will be orderly and peaceful and will not interfere with the rights of others or substantially and materially disrupt the educational process. Any student who is denied such request may appeal the adverse decision to the assistant superintendent.

Any student who interferes with, intimidates, harasses or injures another student while at school or while traveling to and from school or intimidates, harasses or injures an employee of the Houston Independent School District shall, at the discretion of the principal, be suspended from school and such person may be charged with violating applicable municipal, state and federal laws.

Student Publications

Student participation in the publication of school newspapers, yearbooks, literary magazines and similar publications is encouraged by the Houston Independent School District as learning and educational experiences. These publications have qualified faculty advisors and strive to meet high standards of journalism. Opportunities for a broad spectrum of opinions shall be provided.

In addition to school-sponsored publications, students are entitled to express in writing their opinions and may distribute handwritten, duplicated or printed materials on school premises or at school-sponsored activities at other locations in accordance with the following conditions and procedures:

(1) A copy of the publication must be given to the principal, who may take up to one school working day for the purpose of reviewing such publication before its general distribution. If, in the opinion of the principal and the attorneys employed by the Houston Independent School District, the publication contain libelous or obscene language or advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees, the principal shall notify the individual or sponsors

of the publication that it cannot be distributed on the school premises. Distribution shall not be prohibited because the publication contains the expression of any idea, popular or unpopular.

(2) A time and place for distribution must be cooperatively established with the principal, except that in any event the distribution can take place before and after regular school hours on school premises.

(3) The publication cannot be sold on school premises.

(4) The publication must contain the names of the individual contributors, editors and publishers.

Distribution on school premises of material consisting primarily of commercial advertising or literature advocating the nomination or election of any person for public office is expressly prohibited.

Distribution of printed material off school premises will be subject to the foregoing rules when the manner of distribution is calculated to and in fact does result in possession by students on school premises. This includes distribution at places adjacent to the school premises in the morning before normal classroom activity has begun.

Student Dress and Personal Grooming

The Houston Independent School District recognizes the importance of encouraging high standards in dress and personal grooming. In those areas where dress and personal grooming relate (i) to specific class instruction or school curriculum such as shop and fashion design, (ii) to cleanliness or health or (iii) to any type of dress or wearing apparel which indecently exposes the person

or substantially disrupts the educational process, the school has a legitimate interest which may be preserved by the use of corrective or disciplinary measures.

Within this framework, each individual school shall adopt specific standards concerning dress and personal grooming. Each principal is directed to establish a committee each year for the purpose of formulating and reviewing dress and personal grooming standards for the school. The committee at each junior and senior high school should be composed of approximately 50% students, 20% parents and 30% teachers and school administrators. Each student governing body should devise a method for selecting students to the committee which will result in all points of view being represented. At each elementary school, the principal should appoint a representative group of parents and teachers to advise him in formulating the standards. Copies of the standards that are adopted by each committee shall be forwarded to the Superintendent for Instruction and Administration who shall submit them to the attorneys for their review and then copies will be distributed to all parents and students.

Possession and Use of Narcotics and Dangerous Drugs

Any student found selling or possessing a narcotic or dangerous drug (as defined by the Penal Code of the State of Texas, including but not limited to marijuana, L.S.D., barbiturates and heroin), not prescribed by a licensed physician, while on school premises or while participating in a school-sponsored activity shall be suspended. After such suspension, each case must be reviewed by the appropriate assistant superintendent before the student can be readmitted to school.

Any case involving the possession and misuse of narcotics and dangerous drugs should be reported immediately to the appropriate assistant superintendent and the Director of School Health Services by phone and in writing. The parent or guardian should also be notified immediately and requested to come to the school. After proper notification, if the parent or guardian cannot or will not come to the school, a letter should be sent to him describing the circumstances. The Juvenile Division of the Houston Police Department should also be notified immediately.

Article 2338-1, Revised Civil Statutes of Texas, establishes procedures whereby juveniles* can be dealt with under civil rules in cases of use or possession of drugs. Legal regulations concerning possession, as given by the District Attorney's office, include the following:

(1) Any juvenile found guilty of possession of a narcotic drug may be sent to a juvenile correctional institution until he is 21 years of age or may be placed under the supervision of a probation officer. (Penal Code, Art. 725b)

(2) Any juvenile found guilty of possession of a dangerous drug—any drug unsafe for self-medication —may be punished as in narcotic offenses. (Penal Code, Art. 726d)

(3) For possession of a hallucinogenic substance, the juvenile offender will be treated as in narcotic and dangerous drug offenses.

(4) Any person, juvenile or adult, found in violation of the drug laws of Texas will be arrested and

* Legal definition of a juvenile: boy, ages 10-16; girl, ages 10-17.

prosecuted, thus giving him a permanent record of arrest.**

Any student moving into the Houston Independent School District, who, for any of the above reasons, is under suspension from another school system shall not be admitted until his suspension term has been ended, or he has been exonerated by the suspending district.

A report of any disciplinary action concerning the above violations shall be sent immediately to the receiving principal of the school to which a student under such action may transfer.

Suspension Procedures

If in the opinion of the principal any student violates published rules and regulations on student conduct adopted by the Board of Trustees, such student may be suspended for a reasonable period of time not exceeding three school days. In all cases where a student is suspended, the student and the parent or guardian shall be notified in writing of the reasons therefor. If a student is sent home during the day, the parent or guardian must be notified in advance.

If the suspension period is for an indefinite period of time or a period in excess of three school days, the following procedures shall apply:

(1) The student and his parent or guardian must be notified in writing of the reasons for suspending the student and a prompt hearing at the school must be arranged if requested by the student or parent or guardian. The student and his parent or guardian

** Quoted from *Drug Scene*, by Carol S. Vance, Harris County District Attorney.

shall be furnished with a copy of the suspension procedures and advised that they may have witnesses and present evidence at the hearing to refute the allegations of misconduct.

(2) A student or his parent or guardian who desires to be assisted at the hearing or any disciplinary proceeding may be accompanied by an adult person who may represent and assist him in the proceedings. If a parent or guardian is unable to attend, he may designate an adult to represent the student. The Houston Independent School District may require evidence of the appointment of any such representative.

(3) If substantial evidence is presented at the hearing which, in the judgment of the principal, warrants suspension for a substantial period of time, he shall inform the student and parent or guardian of the decision not to reinstate the student and apprise the student and parent or guardian of the right to appeal the decision to the appropriate assistant superintendent. The decision of the principal shall be based exclusively on evidence presented at the hearing.

(4) Any student or his parent or guardian who wishes to appeal shall notify the principal in writing of his intention to appeal. The principal shall immediately notify his assistant superintendent who will arrange a time for hearing the appeal. Such notification to the assistant superintendent shall include or be immediately followed by a letter from the principal containing a complete description of the student's conduct, including all offenses and dates, any pertinent supplemental information and a rec-

ommendation for disposing of the case. The assistant superintendent shall notify the student and the parent or guardian of the time and place of the hearing. The hearing shall be held within seven days from the date the student or parent or guardian notifies the principal of his intention to appeal, unless the parent or guardian agrees to an extension.

(5) At the hearing on appeal, the assistant superintendent shall confer with the principal and the student and his parents or guardian and determine whether the student shall be suspended for more than three school days or be reinstated.

(6) If suspension in excess of three school days is sustained on the basis of substantial evidence presented at the hearing, the assistant superintendent will forward the pertinent information to the deputy superintendent for elementary or secondary schools and the Superintendent for Instruction and Administration, who will review the facts and confirm or reverse the decision.

(7) The student or his parent or guardian may appeal the decision by school administrative officials to the Board of Trustees.

Notices to Parents or Guardian

When necessary to assure effective communication, any notice required herein to be sent to the parents or guardian of a student shall be written in the language spoken by the parents or guardian. If the language spoken by the parents is other than Spanish, such notice shall be written in such other language if facilities are available.